

RV 179
CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

.No. 82

THE UNITED STATES OF AMERICA, APPELLANT

VS.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF GEORGIA**

FILED MAY 18, 1940

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 82

THE UNITED STATES OF AMERICA, APPELLANT

vs.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF GEORGIA**

INDEX

	Original	Print
Record from D. C. U. S., Southern District of Georgia	1	1
Caption [omitted in printing]	1	1
Indictment	2	1
Defendant's demurrer	23	14
Opinion of Court, Barrett, J.	25	16
Judgment and order sustaining demurrer	30	21
Petition for appeal	31	21
Order allowing appeal	32	22
Assignment of errors	33	22
Citation [omitted in printing]	41	23
Praecipe for transcript of record	42	24
Clerk's certificate to record. [omitted in printing]	43	24
Statement of points to be relied upon and designation of record to be printed	44	24

BLANK PAGE

1 [Caption omitted.]

2 In United States District Court for the Southern District of
Georgia

August Adjourned Term, 1939

No. 9175

UNITED STATES OF AMERICA

vs.

F. W. DARBY LUMBER COMPANY, AND FRED W. DARBY

Indictment

Filed Nov. 2, 1939

Offense:

Violation of Section 15 (a) (2), Fair Labor Standards Act of 1938:
Failure to pay minimum wage (Counts 1 to 3, inclusive). Failure
to pay compensation for overtime (Counts 4 to 11, inclusive).

Violation of Section 15 (a) (5), Fair Labor Standards Act of 1938:
Failure to keep record (Count 12).

Violation of Section 15 (a) (1), Fair Labor Standard Act of 1938:
Interstate shipment of goods with knowledge (Counts 13 to 16,
inclusive). Interstate shipment of goods produced without payment
of minimum wage or compensation for overtime (Counts 17 to 19,
inclusive).

3 [Title omitted.]

INDICTMENT

The Grand Jurors of the United States of America, duly empaneled
and sworn in the District Court of the United States for the Southern
District of Georgia, and inquiring for that District, at the adjourned
term of said Court, upon their oath present that:

1. F. W. Darby Lumber Company was at all times hereinafter men-
tioned, and now is, an unincorporated company, the ownership of
which was, at all times hereinafter mentioned, and now is, vested in
Fred. W. Darby.

2. Fred. W. Darby, of Statesboro, in the County of Bulloch, within
the Southern District of Georgia, and the jurisdiction of this court,
is made a defendant herein. The defendant does and did, at all times
hereinafter referred to, own and control the F. W. Darby Lumber
Company, and was, and is, in active control of the management of the
said F. W. Darby Lumber Company, and was, and is, in charge of
its books and records and did and does superintend and direct the

making of entries therein, including entries of hours worked by and wages paid to persons employed by the said F. W. Darby Lumber Company at its principal place of business at Statesboro, Georgia.

3. The F. W. Darby Lumber Company, and the defendant, Fred. W. Darby, were at all times hereinafter referred to, and now are, engaged in the business of buying, procuring, obtaining, producing, manufacturing, and selling lumber. In the course of said business the defendant receives orders for lumber; procures and obtains raw material; the defendant seams, cuts, clips, dries, grades, tops, glues, trims, sands, counters, and performs other operations necessary and incident to the buying, procuring, obtaining, producing, and manufacturing of lumber; the defendant bundles, packs, and ships lumber bought, procured, obtained, produced, and manufactured.

4. At all times hereinafter referred to, a large proportion of the lumber bought, procured, obtained, produced, and manufactured by the defendant was bought, procured, obtained, produced, and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia. The said lumber was bought, procured, obtained, produced, and manufactured with the intent on the part of the defendant that the said lumber after having been bought, procured, obtained, produced, and manufactured would be sold, shipped, transported, and delivered to and the said lumber was sold, shipped, transported, and delivered to customers without the State of Georgia. In buying, procuring, obtaining, producing, and manufacturing the said lumber, the defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

5. The defendant, Fred. W. Darby, at all times hereinafter referred to, acted and now acts, both directly and indirectly in his own interest and in the interest of the F. W. Darby Lumber Company, and in relation to his own employees, and is thus an employer of the said employees within the meaning of the Fair Labor Standards Act of 1938.

6. The defendant, Fred. W. Darby, at all times hereinafter referred to, employed and permitted and suffered to work in the production and manufacture of goods, to wit, lumber, persons who were employees within the meaning of the Fair Labor Standards Act of 1938.

7. At all times hereinafter referred to a large proportion of the said employees were engaged in the production and manufacture of goods, to wit, lumber for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

8. When used in this indictment, the word "employed" shall be taken to mean "employed or suffered or permitted to work," the words "employee" and "employees" shall be taken to include any person employed, the words "employed in the production of goods" shall be taken to mean "employed in the buying, procuring, obtaining, producing, manufacturing, handling, and in any other manner working on goods produced, and employed in any process or occupation

necessary to the production thereof," and the very "to employ" shall include "to act directly or indirectly in the interest of an employer in relation to an employee."

9. The defendant Fred. W. Darby, at F. W. Darby Lumber Company at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Levy Weaver during the workweek beginning March 3, 1939, and ending March 9, 1939, and the said defendant in Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Levy Weaver wages at a rate not less than twenty-five cents (25¢) an hour for the said work for the said workweek; that is to say, the said defendant, at the time and place aforesaid, did pay to the said Levy Weaver wages at a rate less than twenty-five cents (25¢) an hour for the said work for the said workweek.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

6 COUNT TWO

And the Grand Jurors aforesaid, upon their oath aforesaid, to further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of the first count of this indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant, Fred. W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Roger Stone during the workweek beginning August 11, 1939, and ending August 17, 1939, and the said defendant, in Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about August 26, 1939, did unlawfully and wilfully fail to pay to the said Roger Stone wages at a rate not less than twenty-five cents (25¢) an hour for the said work for the said workweek; that is to say, the said defendant, at the time and place aforesaid, did pay to the said Roger Stone wages at a rate less than twenty-five cents (25¢) an hour for the said work for the said workweek.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT THREE

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of the first Count of this indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant, Fred. W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Carl Riggs during the workweek beginning August 11, 1939, and ending August 17, 1939, and the said defendant, in Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about August 26, 1939, did unlawfully and wilfully fail to pay to the said Carl Riggs wages at a rate not less than twenty-five cents (25¢) an hour for the said work for the said workweek; that is to say, the said defendant, at the time and place aforesaid, did pay to the said Carl Riggs wages at a rate less than twenty-five cents (25¢) an hour for the said work for the said workweek.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT FOUR

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant Fred. W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Dave Hutchinson for a workweek longer than forty-four (44) hours, beginning February 24, 1939, and ending March 2, 1939, and the said defendant at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Dave Hutchinson wages for the excess hours over forty-four (44) worked by the said Dave Hutchinson during the workweek aforesaid, at a rate not less

than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Dave Hutchinson was employed; that is to say, the said defendant did employ and suffer to permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Dave Hutchinson for a workweek longer than forty-four (44) hours, beginning February 24, 1939 and ending March 2, 1939, and at the time and place aforesaid, did pay compensation to the said Dave Hutchinson for his employment in excess of forty-four (44) hours worked during the aforesaid workweek at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT FIVE

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant Fred. W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Henry C. Cowart for a workweek longer than forty-four (44) hours, beginning February 24, 1939, and ending March 2, 1939, and the said defendant, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, or on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Henry C. Cowart wages for the excess hours over forty-four (44) worked by the said Henry C. Cowart during the workweek aforesaid, at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Henry C. Cowart was employed; that is to say, the said defendant did employ and suffer and permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Henry C. Cowart for a workweek longer than forty-four (44) hours, beginning February 24, 1939, and ending March 2, 1939, and at the time and place aforesaid, did pay compensation to the said Henry C. Cowart for his employment in excess of forty-four (44) hours worked during the aforesaid workweek at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT SIX

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant Fred W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch; within the Southern District of Georgia, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Jim Allen for a workweek longer than forty-four (44) hours, beginning February 24, 1939, and ending March 2, 1939, and the said defendant, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Jim Allen wages for the excess hours over forty-four (44) worked by the said Jim Allen during the workweek aforesaid, at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Jim Allen was employed; that is to say, the said defendant did employ and suffer and permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Jim Allen for a workweek longer than forty-four (44) hours, beginning February 24, 1939, and ending March 2, 1939, and at the time and place aforesaid, did pay compensation to the said Jim Allen for his employment in excess of forty-four (44) hours worked during the aforesaid work-week at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT SEVEN

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant Fred W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Roger Stone for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939,

and the said defendant, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Roger Stone, wages for the excess hours over forty-four (44) worked by the said Roger Stone during the workweek aforesaid, at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Roger Stone was employed; that is to say, the said defendant did employ and suffer and permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Roger Stone for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and at the time and place aforesaid, did pay compensation to the said Roger Stone for his employment in excess of forty-four (44) hours worked during the aforesaid workweek at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT EIGHT

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant, Fred W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Carl Riggs, for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and the said defendant, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Carl Riggs wages for the excess hours over forty-four (44) worked by the said Carl Riggs during the workweek aforesaid, at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Carl Riggs was employed; that is to say, the said defendant did employ and suffer and permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Carl Riggs for a workweek longer than forty-four hours, beginning March 3, 1939, and ending March 9, 1939, and at the time and place aforesaid, did pay compensation to the said Carl Riggs for his employment in excess of forty-four (44) hours worked during the aforesaid workweek at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

8
UNITED STATES VS. F. W. DARBY LUMBER CO.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT NINE

And the Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant Fred. W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Joe Little, for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and the said defendant, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Joe Little wages for the excess hours over forty-four (44) worked by the said Joe Little during the workweek aforesaid, at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Joe Little was employed; that is to say, the said defendant did employ and suffer and permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Joe Little for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and at the time and place aforesaid, did pay compensation to the said Joe Little for his employment in excess of forty-four (44) hours worked during the aforesaid workweek at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT TEN

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant, Fred. W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, pro-

14. ducing and manufacturing of goods, to wit, lumber, for interstate commerce, one Sylvester Harvey for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and the said defendant, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Sylvester Harvey wages for the excess hours over forty-four (44) worked by the said Sylvester Harvey during the workweek aforesaid, at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Sylvester Harvey was employed; that is to say, the said defendant did employ and suffer and permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Sylvester Harvey for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and at the time and place aforesaid, did pay compensation to the said Sylvester Harvey for his employment in excess of forty-four (44) hours worked during the aforesaid workweek at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

Against the peace and dignity of the United States of America, and contrary to the form of the Statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT ELEVEN

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The defendant Fred. W. Darby, at F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ and suffer and permit to work in the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce, one Ben McBride for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and the said defendant, at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, on or about March 11, 1939, did unlawfully and wilfully fail to pay to the said Ben McBride wages for the excess hours over forty-four (44) worked by the said Ben McBride during the workweek aforesaid, at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate, at which the said Ben McBride was employed; that is to say, the said defendant did employ and suffer and permit to work in the production of goods, to wit, lumber, for interstate commerce, the said Ben McBride for a workweek longer than forty-four (44) hours, beginning March 3, 1939, and ending March 9, 1939, and

at the time and place aforesaid, did pay compensation to the said Ben McBride for his employment in excess of forty-four (44) hours worked during the aforesaid workweek at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he was employed.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT TWELVE

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. On October 21, 1938, the duly appointed Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to authority vested in him by Section 11 (c) of the Fair Labor Standards Act of 1938, duly issued regulations on records to be kept by employers subject to any provision of the Fair Labor Standards Act of 1938. The said regulations were published in the 16 Federal Register on October 22, 1938, and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516. The said regulations require every employer subject to any provisions of the Fair Labor Standards Act of 1938 to make and preserve records setting forth, among other things, the hours worked each workday and each workweek by each person employed by him.

3. The defendant, Fred. W. Darby, at the F. W. Darby Lumber Company, at Statesboro, in the County of Bulloch, in the Southern District of Georgia, and within the jurisdiction of this court, during the period from October 24, 1938, up to, on or about September 15, 1939, did unlawfully and willfully fail to make, keep, and preserve a record required to be made, kept, and preserved by the statute and by the regulations duly issued thereunder, and hereinbefore referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, to wit, a record of the hours worked each workday and each workweek by each person employed, within the meaning of the Fair Labor Standards Act of 1938, by defendant, including persons so employed in the production and manufacture of goods, to wit, lumber, for interstate commerce.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT THIRTEEN

The Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment, is here realleged with the same force and effect as if here set forth in full.

2. The F. W. Darby Lumber Company, and the defendant, Fred W. Darby on or about March 7, 1939, at Savannah, Georgia, within the Southern District of Georgia, and within the jurisdiction of this Court, did unlawfully and wilfully transport, ship, and deliver from a point in the State of Georgia, to a point without the State of Georgia, and in Gainesville, Florida, a shipment identified by Atlantic Coast Line Railroad bill of lading dated March 7, 1939, containing goods, to wit, lumber, which the defendant had cut and produced by Daniel B. Gay, knowing that in the cutting and production of goods, to wit, lumber, Daniel B. Gay intended the said lumber would be shipped in interstate and foreign commerce, and that Daniel B. Gay employed in the production of said lumber, employees, within the meaning of the Fair Labor Standards Act of 1938, to whom he failed to pay wages at a rate not less than twenty-five cents (25¢) an hour, and to whom Daniel B. Gay paid wages at a rate less than twenty-five cents (25¢) an hour.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT FOURTEEN

The Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment, is here realleged with the same force and effect as if here set forth in full.

2. The F. W. Darby Lumber Company, and the defendant, Fred W. Darby, on or about May 17, 1939, at Savannah, Georgia, within the Southern District of Georgia, and within the jurisdiction of this court, did unlawfully and wilfully ship and deliver from a point within the State of Georgia, to a point without the State of Georgia, and in New York City, New York, a shipment identified by Ocean Steamship Company bill of lading, dated May 17, 1939, containing goods, to wit, lumber, which the defendant had cut and produced by Daniel B. Gay, knowing that in the cutting and production of goods, to wit, lumber, Daniel B. Gay intended the said lumber would be shipped in interstate and foreign commerce, and that Daniel B. Gay employed in the production of said lumber, employees within the meaning of the Fair Labor Standards Act of 1938, to whom he failed to pay wages at a rate not less than twenty-five cents (25¢) an hour and to whom Daniel B. Gay paid wages at a rate less than twenty-five cents (25¢) an hour.

COUNT FIFTEEN

The Grand Jurors aforesaid on their oath aforesaid, do further present that:

1. Each and every allegation, contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment, is here realleged with the same force and effect as if here set forth in full.

2. The F. W. Darby Lumber Company, and the defendant, Fred W. Darby on or about December 2, 1938, at Statesboro, Georgia, within the Southern District of Georgia, and within the jurisdiction of this Court, did unlawfully and wilfully transport, ship, and deliver from a point in the State of Georgia, to a point without the State of Georgia, and in Orangeburg, South Carolina, a shipment identified by F. W. Darby Lumber Company invoice Number 4552, containing goods, to wit, lumber, which the defendant had cut and produced by Daniel B. Gay, knowing that in the cutting and production of goods, to wit, lumber, Daniel B. Gay intended the said lumber would be shipped in interstate and foreign commerce, and that Daniel B. Gay employed in the production of said lumber, employees within the meaning of the Fair Labor Standards Act of 1938, to whom he failed to pay wages at a rate not less than twenty-five cents (25¢) an hour and to whom Daniel B. Gay paid wages at a rate less than 25¢ an hour.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT SIXTEEN

The Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment, is here realleged with
19 the same force and effect as if here set forth in full.

2. The F. W. Darby Lumber Company, and the defendant Fred W. Darby on or about August 8, 1939, at Statesboro, Georgia, within the Southern District of Georgia, and within the jurisdiction of this court, did unlawfully and wilfully transport, ship, and deliver from a point in the State of Georgia, to a point without the State of Georgia, and in Toledo, Ohio, a shipment identified by F. W. Darby Lumber Company invoice number 6760-B, containing goods, to wit, lumber, which the defendant had cut and produced by Daniel B. Gay knowing that in the cutting and production of goods, to wit, lumber, Daniel B. Gay intended the said lumber would be shipped in interstate and foreign commerce, and that Daniel B. Gay employed in the production of said lumber, employees, within the meaning of the Fair Labor Standards Act of 1938, to whom he failed to pay wages at a rate not less than twenty-five cents (25¢) an hour and to whom Daniel B. Gay paid wages at a rate less than twenty-five cents (25¢) an hour.

Against the peace and dignity of the United States of America, and contrary to the form of the Statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT SEVENTEEN

The Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The F. W. Darby Lumber Company, and the defendant Fred. W. Darby, on or about March 7, 1939, and in Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this court, unlawfully and wilfully transported, shipped, and delivered from a point within the State of Georgia and to a point without the State of Georgia, and in the State of Florida, processed and finished lumber, identified by Atlantic Coast Line Railroad bill of lading, dated March 7, 1939, said processed and finished lumber manufactured and produced for interstate commerce, in the production and manufacture of which the defendant had employed employees to whom the defendant had failed to pay wages at a rate not less than twenty-five cents (25¢) an hour and to whom the defendant had paid wages at a rate less than twenty-five cents (25¢) an hour.

Against the peace and dignity of the United States of America, and contrary to the form of the Statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT EIGHTEEN

And the Grand Jurors aforesaid, on their oath aforesaid do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The F. W. Darby Lumber Company, and the defendant Fred. W. Darby, on or about March 7, 1939, and in Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this Court, unlawfully and wilfully, transported, shipped, and delivered from a point within the State of Georgia, to a point without the State of Georgia, and in the State of Florida processed and finished lumber, identified by Atlantic Coast Line Railroad bill of lading, dated March 7, 1939, said processed and finished lumber being manufactured and produced for interstate commerce in the production of which the defendant had employed employees in excess of forty-four (44) hours in one workweek, and to whom the defendant failed to pay wages at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate for the excess hours over forty-four (44) hours so worked, and to whom the defendant paid wages at a rate less than one and one-half ($1\frac{1}{2}$) times the regular rate of pay for the hours worked in excess of forty-four (44) hours in said workweek.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

COUNT NINETEEN

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that:

1. Each and every allegation contained in paragraphs 1 to 8, inclusive, of Count One of this Indictment is here realleged with the same force and effect as if here set forth in full.

2. The F. W. Darby Lumber Company, and the defendant Fred. W. Darby, on or about August 8, 1939, and at Statesboro, in the County of Bulloch, within the Southern District of Georgia, and within the jurisdiction of this Court, unlawfully and wilfully transported, shipped, and delivered from a point within the State of Georgia to a point without the State of Georgia, and in the State of Ohio, processed and finished lumber identified by F. W. Darby Lumber Company invoice Number 6760-B, said processed and finished lumber manufactured and produced for interstate commerce, in the production and manufacture of which the defendant had employed employees to whom the defendant had failed to pay wages at a rate not less than twenty-five cents (25¢) an hour and to whom the defendant had paid wages at a rate less than twenty-five cents (25¢) an hour.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided (Fair Labor Standards Act of 1938).

A true bill.

(Signed) R. R. HOLLAND,
R. R. Holland,

Foreman of the Grand Jury.

(Signed) H. DOUGLAS WEAVER,
H. Douglas Weaver,

Special Assistant to the Attorney General.

(Signed) CLYDE E. VINCENT,
Clyde E. Vincent,

Special Assistant to the Attorney General.

(Signed) GEORGE A. DOWNING,
George A. Downing,

Special Assistant to the United States Attorney.

(Signed) J. SAXTON DANIEL,
United States Atty.

22 [File endorsement omitted.]

23 In United States District Court

[Title omitted.]

Defendant's demurrer

Filed Feb. 16, 1940

Now comes the defendant, Fred. W. Darby, and before pleading to the indictment in the above stated case, demurs thereto, and moves

to quash the same, and for grounds of his demurrer and motion to quash says:

1. The said indictment does not allege facts sufficient to constitute a crime within the provisions of any valid statute of the United States of America.

2. The said indictment fails to advise this defendant of the nature of the charge against him, or to advise him in what manner he has violated the law.

3. Said indictment fails to state an offense of which this Court may take cognizance, or has jurisdiction, in that it fails to charge that the manufacture, production, or sale of lumber is trade or commerce among the several States or constitutes interstate commerce.

4. The averments of said indictment fail to state the acts and things constituting the offense therein charged with sufficient particularity to inform this defendant of the nature of the charge against him, in that

(a) The amounts paid by defendant to the employees mentioned in counts 1 to 11, inclusive, and the number of hours worked by each of said employees during any work week are not alleged;

(b) When the lumber mentioned in counts 13, 14, 15, and 16 of said indictment was cut and produced by Daniel B. Gay is not alleged; and

(c) When the lumber mentioned in counts 17, 18, and 19 was manufactured and produced is not alleged.

5. The Fair Labor Standards Act of 1938 (52 Stat. 1060, et seq., 29 U. S. C. Section 201, et seq.) in so far as it attempts to prescribe minimum wages which must be paid by employers to employees and the minimum hours an employer may employ his employees, during a work week, without the payment of a rate not less than one and one-half times the regular rate at which he is employed; as applied to this defendant, is unconstitutional, null and void, for that:

(a) The same is beyond the power conferred upon the Congress by Article I, Section 8 of the Constitution of the United States;

(b) The same is violative of the due process of law clause of the Fifth Amendment of the Constitution of the United States;

(c) The same is violative of the clause of the Sixth Amendment of the Constitution of the United States which requires in all criminal prosecutions that the accused shall be informed of the nature and cause of the accusation;

(d) The power which Congress has sought to exercise is not one of the powers delegated to the United States by the Constitution, but is among the reserved powers of the States under the Tenth Amendment of the Constitution of the United States.

6. The criminal penalties sought to be imposed by the Fair Labor Standards Act of 1938 constitute excessive fines and cruel and unusual punishment, in violation of the Eighth Amendment of the Constitution of the United States.

7. Section 3 (m) of the Fair Labor Standards Act of 1938 is unconstitutional, null and void, if applied against this defendant, for that it violates the due process clause of the Fifth Amendment of the Constitution of the United States and also violates Article 1, Section 1 of the said Constitution in that it attempts to delegate legislative authority to the Executive Department of the United States, without establishing sufficient, definite or ascertainable standards for the exercise of the authority sought to be delegated.

WHEREFORE, defendant prays that these, his grounds of demurrer, be inquired of by the Court, considered and sustained, and that said indictment be quashed.

HITCH DENMARK & LOVETT,
Attorneys for Defendant.

(Signed) A. B. LOVETT,
Of Counsel,
17 Drayton Street, Savannah, Georgia.
[File endorsement omitted.]

25 In United States District Court for the Southern District of Georgia, Savannah, Georgia

No: 9175. Violations of Fair Labor Standards Act of 1938

UNITED STATES OF AMERICA

v.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

Opinion

Filed April 30, 1940

WILLIAM H. BARRETT, *District Judge:*

Subsequent to the able oral arguments and the submission of thorough and exhaustive briefs in this case the Circuit Court of Appeals for the Fifth Circuit decided the case of *Opp Cotton Mills, Inc., v. Administrator Wage and Hour Division, Etc.* (April 2, 1940).

In the opinion in the *Opp* case is found this language: "We are of opinion and so hold that the enactment of the Fair Labor Standards Act was a valid exercise of the power given to Congress by the commerce clause of the federal constitution."

If such language is all-inclusive under all conditions this court is bound by such decision and will cheerfully follow the same. Apparently the Circuit Court of Appeals felt compelled to its conclusion by certain decisions of the Supreme Court of the United States. An accurate ascertainment of the scope of such language can be best revealed by a study of the cases which required it. The essential question here is: Does such decision control intrastate activities of the kind involved in the case at bar? I think not.

The cases relied upon by the Circuit Court of Appeals to compel its conclusion are as follows:

Mulford v. Smith, 307 U. S. 38. In this case we find this statement in headnote 2 (1):

"The statute does not purport to control production, but regulates commerce in tobacco through marketing."

Kentucky Whip & Collar Co. v. Illinois, Etc. R. R., 299 U. S. 334. This was an exercise of the power of Congress to aid states in the enforcement of state laws.

Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1. In headnotes 7 and 8 of this case we find this statement of one of the principles controlling in such case:

"7. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control.

"8. This power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace would then, in view of our complex society, effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

Currin v. Wallace, 306 U. S. 1. After stating the regulation we find the following in headnote 2, subheads (1), (2), (3), and (4):

26 " (1) Such regulation, for the protection of sellers or purchasers, or both, is within the commerce power as respects the selling for transportation to other states or abroad; and in view of the manner of the selling at the auctions, where all transactions are conducted indiscriminately and virtually at the same time, Congress was authorized to apply its regulation to intrastate sales in order to make it effective as to the sales in interstate and foreign commerce.

" (2) The auction is a part of the sales consummated, notwithstanding that in the market practice the growers are not bound to accept bids, and in some instances reject them.

" (3) Regulations under the commerce clause may have the quality of police regulations.

" (4) The inspection and grading under the Act, though they take place before the auction, have immediate relation to the sales in interstate and foreign commerce."

Santa Cruz Co. v. Labor Board, 303 U. S. 453. On page 454 (headnotes 6 and 7), the following principle is stated:

" (6) Where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.

"7. This principle is essential to the maintenance of our constitutional system."

Brooks v. United States, 267 U. S. 432. The extent of this decision is thus stated in headnote 1:

"The Act punishing the transportation of stolen motor vehicles in interstate of foreign commerce is within the power of Congress."

Lottery Case (Champion v. Ames, No. 2), 188 U. S. 321. The decision arose on a habeas corpus proceeding, and the extent of the decision is stated in headnote 3, as follows:

"Legislation prohibiting the carriage of such tickets is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

Hammer v. Dagenhart, 247 U. S. 251. The import of this decision may be well understood from the following headnotes:

"The power to regulate interstate commerce is the power to prescribe the rule by which the commerce is to be governed; in other words, to control the means by which it is carried on."

"The manufacture of goods is not commerce, nor do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to the control of Congress."

All except the two cases of Brooks v. United States and Champion v. Ames, above referred to, were civil cases and opportunity was afforded and used to investigate the facts connected with the alleged violations of law involved. In each case it was held that the particular facts therein authorized the law.

On June 5, 1939, the Supreme Court decided the case of United States v. Rock Royal Co-operative, 307 U. S. 533, which also was a civil case. The particular challenge involved in such case is the regulation of "the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant." It was held that such sale could be controlled, but the principle authorizing such control is that stated in headnote 11, page 536:

"Where milk sold by the dairy farmer locally and milk from other States are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens, and obstructions arising from excessive surplus and the social and sanitary evils created by low prices, the power of Congress extends also to the local sales."

In the case at bar there are no charges of facts which bring the alleged violations within the ambit of which would make interstate commerce out of which is primarily intrastate activities. The controlling facts alleged which affect every charge made as to interstate commerce is no stronger than this, namely:

27 "4. At all times hereinafter referred to, a large proportion of the lumber bought, procured, obtained, produced, and manu-

factured by the defendant was bought, procured, obtained, produced, and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia. The said lumber was bought, procured, obtained, produced, and manufactured with the intent on the part of the defendant that the said lumber after having been bought, procured, obtained, produced, and manufactured would be sold, shipped, transported, and delivered to and the said lumber was sold, shipped, transported, and delivered to customers without the State of Georgia. In buying, procuring, obtaining, producing, and manufacturing the said lumber, the defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938."

There is no charge as to when the intent to ship was formed or abandoned; there is no charge that at the time of the production there was in existence any contract making the shipment a part of interstate commerce, and even as to the indefinite charge that "a large proportion of the lumber bought, procured, obtained, produced, and manufactured by the defendant was bought, procured, obtained, produced, and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia" there is no charge that such orders were of such an amount or nature as to directly affect interstate commerce or to become a flow of commerce or to come within any of the other conditions which would make the production of lumber, disconnected from interstate commerce at the time of production, a part of interstate commerce and subject to control by Congress.

The indictment charges that production was complete and that sale in interstate commerce was not made until after the production was completed. The essential constitutional question in reference to the interstate commerce clause is as to the meaning of the language of the

Act, Sec. 6:

28 "Every employer shall pay to each of his employees who is engaged in commerce or in the *production of goods for commerce* wages at the following rates" [italics ours].

If the language "in the production of goods for commerce" be limited to production which at the time of production was directly connected with interstate commerce or was coupled with some act or acts pertaining to and making such production a part of interstate commerce the Act is constitutional; but if the Act means, as this indictment charges, that the mere intent at the time of production that after production it may or will be sold in interstate commerce in part or in whole makes it a part of interstate commerce, the Act is unconstitutional. See *Hammer v. Dagenhart*, supra, declaring that manufacture is not commerce and intent to subsequently sell in interstate commerce does not make manufacturing commerce; and *Labor Board v. Jones & Laugh*, in, supra, declaring that intrastate activities cannot be controlled under the interstate commerce clause unless

such activities have "such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions."

The indictment charges nothing more than failure to pay minimum wages in production of goods with intent that such goods after production was completed would be connected with interstate commerce. There are no allegations notifying the defendant that such production in intrastate activities was so connected with interstate commerce as to justify the control of Congress under the commerce clause of the constitution.

No man should be put on trial in a criminal case unless he knows definitely what is the charge against him. In the absence of such definiteness as would justify the law under the interstate commerce clause the indictment must fall.

If Congress can under the interstate commerce clause provision of the constitution regulate state activities only when connected with interstate commerce or affecting interstate commerce in some of the ways and to the extent limited by decisions of the United States Supreme Court why should not the act of Congress so declare? Otherwise, and if the indictments are drawn similar to the one at bar, defendants would not be notified of the crimes with which they are charged. Under the interpretation of the indictment before us and of the Fair Labor Standards Act as urged by the government the regulation of labor would embrace not only (by illustration in the present case) the man who cut the timber or hauled it to the mill; but also the man who planted the seed and cultivated the trees. If the interstate commerce clause carries with it such power to thus create a centralized government as against an "indestructible union composed of indestructible states" (*Texas v. White*, 74 U. S. 725), the sooner it is known the better. It is my opinion that Congress has not yet gone to that extent and that if it has the Act is unconstitutional. Therefore the decision in the *Opp* case, which dealt with a situation where investigation had been had and findings promulgated, does not apply to a case of the kind at bar.

29 It therefore follows that the indictment is quashed. ^a

In view of the conclusion thus reached it is unnecessary to consider other constitutional questions that have been raised. This 27th day of April 1940.

(Signed) Wm. H. BARRETT,
United States Judge.

[File endorsement omitted.]



30 In United States District Court, Southern District of Georgia,
Savannah Division

No. 9175. Violations of Fair Labor Standards Act of 1938

UNITED STATES OF AMERICA

vs.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

Judgment

Filed May 7, 1940

In accordance with the opinion rendered in the above cause on the 29th day of April, 1940, and for the reasons stated in said opinion, the general demurrer is sustained and said indictment is hereby quashed. This May 6th, 1940.

(Signed) WM. H. BARRETT,
United States Judge.

[File endorsement omitted.]

31 In United States District Court

[Title omitted.]

Petition for appeal

Filed May 13, 1940

Comes now the United States of America, plaintiff herein, and states that on the 6th day of May 1940 defendant's demurrer to the indictment herein was sustained and the indictment quashed, and the plaintiff being aggrieved at the ruling of the District Court in sustaining said demurrer to the indictment prays that it may be allowed to appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause duly authenticated may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

(Signed) J. SAXTON DANIEL,
J. Saxton Daniel,
United States Attorney.

(Signed) ROBERT L. STERN,
Robert L. Stern,
Special Assistant to the Attorney General.

[File endorsement omitted.]

[Title omitted.]

Order allowing appeal

Filed May 13, 1940

The United States having filed a petition for the allowance of an appeal to the Supreme Court of the United States from the order of this Court sustaining a general demurrer to the indictment herein and quashing said indictment, and the United States having filed a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, it is

Ordered and adjudged that the United States of America be and it is hereby allowed an appeal from the order and judgment of this Court sustaining the demurrer and quashing the indictment, and that a duly certified copy of the record of this cause be transmitted to the Clerk of the Supreme Court and that a citation be issued as provided by law.

Dated this 13th day of May, 1940.

(Signed) WM. H. BARRETT,
United States District Judge.

[File endorsement omitted.]

[Title omitted.]

Assignment of errors

Filed May 13, 1940

Now comes the United States of America, having heretofore filed its petition for appeal herein from the order of this court sustaining the demurrer and quashing the indictment in this cause, and files the following assignment of errors:

1. The court erred in holding that the Fair Labor Standards Act, as applied to the activities alleged in the indictment, is not a valid exercise of the federal commerce power.

2. The court erred in holding that the Fair Labor Standards Act is not to be construed as applying to the activities alleged in the indictment.

3. The court erred in holding the Fair Labor Standards Act unconstitutional if applied to persons engaged in the production of lumber to be shipped in interstate commerce, and that accordingly the Act should be construed so as not to cover such employees.

4. The court erred in failing to hold that Section 15 (a) (1) of the Fair Labor Standards Act, which prohibits the shipment in interstate

commerce of goods in the production of which employees were employed in violation of Sections 6 or 7 of said Act, is a valid exercise of the federal commerce power.

5. The court erred in failing to hold that Section 15 (a) (2) of the Fair Labor Standards Act, which makes it unlawful for an employer to violate the provisions of Sections 6 and 7 of the said Act with respect to employees engaged in the production of goods for interstate commerce, is a valid exercise of the federal commerce power.

6. The court erred in failing to hold that Section 15 (a) (5) of the Fair Labor Standards Act, which makes it unlawful for an employer to fail to keep certain records with respect to wages and hours, as required by Section 11 (c) of the Act and regulation issued pursuant thereto, is a valid exercise of the federal commerce power.

7. The court erred in failing to hold that the aforesaid provisions of the Fair Labor Standards Act are constitutional as applied to defendant, a producer and purchaser of lumber who sells such lumber in interstate commerce.

8. The court erred in failing to hold that the aforesaid provisions of the Fair Labor Standards Act apply to defendant, a producer and purchaser of lumber who sells such lumber in interstate commerce.

9. The court erred in sustaining the general demurrer and in quashing the indictment.

Wherefore, the United States of America respectfully prays that the action taken by the court in sustaining the general demurrer and in quashing the indictment be set aside and held for naught.

(Signed) J. SAXTON DANIEL,
J. Saxton Daniel,
United States Attorney.

(Signed) ROBERT L. STERN,
Robert L. Stern,
Special Assistant to the Attorney General.

[File endorsement omitted.]

41 [Citation in usual form filed May 13, 1940, omitted in printing.]

[Title omitted.]

Praecipe for transcript of record

Filed May 13, 1940

To the Clerk, United States District Court, Southern District of Georgia, Savannah Division:

The appellant hereby directs that in preparing the transcript of the record in the above entitled cause for its appeal to the Supreme Court of the United States you include the following:

1. Indictment.
2. Demurrer.
3. Opinion.
4. Order and Judgment Sustaining Demurrer.
5. Petition for Appeal.
6. Order Allowing Appeal.
7. Assignment of Errors.
8. Statement of Jurisdiction of the Supreme Court of the United States.
9. Proof of Service on Appellee of Petition for Appeal, Order Allowing Appeal, Assignment of Errors, and Statement as to Jurisdiction.
10. Citation.
11. This Praecipe.

(Signed) J. SAXTON DANIEL,
J. Saxton Daniel,
United States Attorney.

(Signed) ROBERT L. STERN,
Robert L. Stern,
Special Assistant to the Attorney General.

[File endorsement omitted.]

43 [Clerk's certificate to foregoing transcript omitted in printing.]

44 In the Supreme Court of the United States

Statement of points to be relied upon and designation of record to be printed

Filed June 8, 1940

I

The United States of America, appellant, states that in its brief and oral argument on its appeal in the above entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this case as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

FRANCIS BIDDLE,
Francis Biddle,
Solicitor General.

JUNE 4, 1940.

Service of a copy of the above Statement of Points and Designation of Record to be Printed acknowledge June —, 1940.

A. B. LOVETT,
Counsel for appellee.

[File endorsement omitted.]

[Endorsement on cover:] File No. 44424. S. Georgia, D. C. U. S. Term No. 82. The United States of America, appellant, vs. F. W. Darby Lumber Company and Fred. W. Darby. Filed May 18, 1940. Term No. 82 O. T. 1940.

BLANK PAGE

FILE COPY

U.S. District Court, D. C.
BIRMINGHAM

MAY 18 1940

CHARLES ELWOOD CROPLEY
CLERK

No. ~~1234~~ 82

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES OF AMERICA, APPELLANT

v.
F. W. DANNY LUMBER COMPANY AND FRED W.
DANNY

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF ALABAMA

STATEMENT AS TO JURISDICTION

BLANK PAGE

**In the District Court of the United States
for the Southern District of Georgia,
Savannah Division**

No. 9175

UNITED STATES OF AMERICA

v.

**F. W. DARBY LUMBER COMPANY AND FRED W.
DARBY**

**STATEMENT AS TO JURISDICTION OF THE SUPREME
COURT**

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause;

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682 of the United States Code, otherwise known as the "Criminal Appeals Act," and by Section 345, Title 28 of the United States Code.

B. This cause involves the validity and construction of the Fair Labor Standards Act of 1938, 52

Stat. 1060, U. S. C., Title 29, Section 201, *et seq.* Since various sections of this statute are involved, a copy of the Act is attached to this statement.

C. The judgment of the District Court sought to be reviewed was entered on May 6, 1940, and the petition for appeal was filed on May 13th, 1940, at the same time that this statement as to jurisdiction was filed.

D. The indictment herein consists of nineteen counts. Each count alleges that the defendant is engaged in the business of procuring, producing, manufacturing, and selling lumber, that a large part of the lumber was procured, produced, and manufactured pursuant to orders received from customers without the State of Georgia with the intent that the said lumber would be sold and shipped outside the State of Georgia, that the said lumber was sold and shipped outside the State of Georgia, and that in procuring, producing, and manufacturing the said lumber, defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938 (Paragraphs 3 and 4).

Counts 1 to 3 of the indictment allege that the defendant employed named employees in the "buying, procuring, obtaining, producing, and manufacturing of * * * lumber for interstate commerce" and failed to pay the minimum wage of twenty-five cents per hour required by Sections 6 and 15 (a) (2) of the Fair Labor Standards Act. Counts 4 to 11 allege that the defendant employed

named individuals engaged in producing lumber for interstate commerce for a workweek longer than forty-four hours without paying one and one-half times the regular rate of pay for the excess hours worked over forty-four, in violation of Sections 7 and 15 (a) (2) of the Fair Labor Standards Act. Count 12 alleges that the defendant has wilfully failed to keep and preserve a record of the hours worked each day and week by persons employed, as required by Section 11 (c) of the Fair Labor Standards Act and certain regulations of the administrator issued thereunder. Counts 13 to 16 allege that the defendant did ship from a point within the State of Georgia to points in other states particular shipments of lumber, each of which defendant had cut and produced by Daniel B. Gay, knowing that in the cutting and production of such goods Gay intended that the lumber would be shipped in interstate and foreign commerce and that Gay employed in the production of said lumber employees to whom he failed to pay twenty-five cents per hour, as required by the Fair Labor Standards Act. Counts 17 to 19 allege that the defendant shipped from a point within the State of Georgia to points outside the State particular shipments of lumber manufactured and produced for interstate commerce in the production of which defendant employed employees to whom defendant failed to pay either twenty-five cents per hour or time and one-half for hours worked in excess of forty-four per week.

The defendant filed a demurrer to the indictment. The demurrer was sustained by the District Court on the ground that the Fair Labor Standards Act could not, under the commerce clause, constitutionally be applied to the production of lumber and that the Act should be construed so as to avoid its application in such circumstances.

E. The Fair Labor Standards Act applies both to the wages and hours of employees engaged in interstate commerce, and in the production of goods for such commerce. The decision below holds the Act unconstitutional insofar as it applies to the production of goods for interstate commerce. This ruling is in conflict with the decisions of six other district judges¹ and also with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Opp Cotton Mills, Inc. v. Administrator*, ———, decided April 24, 1940. The decision also invalidates the provisions of the Act prohibiting interstate shipments of goods produced under substandard labor conditions. The questions raised are obviously vital to the administration of the Fair Labor Standards Act.

¹ *United States v. Walters Lumber Company*, 32 F. Supp. 65 (S. D. Fla.); *Andrews v. Montgomery Ward and Co.*, 30 F. Supp. 380 (N. D. Ill., Holly, J.); *United States v. Feature Frocks, Inc.*, Dec. 27, 1939 (N. D. Ill., Woodward, J.); *United States v. Chicago, Macaroni Co.*, Dec. 4, 1939 (N. D. Ill., Barnes, J.); *Wood v. Central Sand and Gravel Co.*, May 3, 1940 (W. D. Tenn., Martin, J.); *Bowie v. Claiborne*, Dec. 26, 1939 (D. C. Puerto Rico).

F. The following decisions sustain the jurisdiction of the Supreme Court upon appeal to review the judgment in this cause on the ground that said judgment is based upon the unconstitutionality and construction of the statute upon which the indictment is based:

United States v. Hastings, 296 U. S. 188, 192.

United States v. Curtiss-Wright Corp., 299 U. S. 304.

United States v. Kapp, 302 U. S. 214, 217.

United States v. Borden Company, 308 U. S. 188.

Appended hereto is a copy of the opinion of the District Court rendered on April 27, 1940.

Respectfully submitted.

(signed) FRANCIS BIDDLE, ✓
Solicitor General.

(signed) J. SAXTON DANIEL, ✓
United States Attorney.

(signed) ROBERT L. STERN, ✓
Special Assistant to the Attorney General.

Endorsement: Indictment No. 9175, Statement as to Jurisdiction of Supreme Court. Filed in Clerk's Office: May 13, 1940. Eugene F. Edwards, Jr., Deputy Clerk.

**In the District Court of the United States
for the Southern District of Georgia,
Savannah Division**

No. 9175

UNITED STATES OF AMERICA

v.

F. W. DARBY LUMBER COMPANY AND FRED W. DARBY

VIOLATIONS OF FAIR LABOR STANDARDS ACT OF 1938

WILLIAM H. BARRETT, District Judge:

Subsequent to the able oral arguments and the submission of thorough and exhaustive briefs in this case the Circuit Court of Appeals for the Fifth Circuit decided the case of *Opp Cotton Mills, Inc., v. Administrator Wage and Hour Division, Etc.* (April 2, 1940).

In the opinion in the *Opp* case is found this language:

We are of opinion and so hold that the enactment of the Fair Labor Standards Act was a valid exercise of the power given to Congress by the commerce clause of the federal constitution.

If such language is all-inclusive under all conditions this court is bound by such decision and will cheerfully follow the same. Apparently the Cir-

STANDARDS CHANGE OCTOBER-24
See Pages 4 & 5

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by repre-

representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purposes), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to

carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended. (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original

order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,*

That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while

[PUBLIC—No. 344—76TH CONGRESS]

[CHAPTER 605—1ST SESSION]

[S. 1234]

AN ACT

To amend section 13 (a) of the Act approved June 25, 1938 (52 Stat. 1069), entitled "Fair Labor Standards Act of 1938".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 (a) of the Act approved June 25, 1938 (52 Stat. 1069), entitled the "Fair Labor Standards Act of 1938", be, and the same is hereby, amended by adding a new subsection 11 as follows: "or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations".

Approved, August 9, 1939.

MINIMUM WAGE RATES
Established By Administrative Order

HOSIERY	At least 32-1/2 cents an hour for seamless Effective Sept. 18, 1939 At least 40 cents an hour for full-fashioned Effective Sept. 18, 1939	
TEXTILES	At least 32-1/2 cents an hour	Effective Oct. 24, 1939
MILLINERY	At least 40 cents an hour	Effective Jan. 15, 1940
SHOES	At least 35 cents an hour	Effective April 29, 1940
KNITTED UNDERWEAR	At least 33-1/2 cents an hour	Effective May 6, 1940
KNITTED OUTERWEAR	At least 35 cents an hour	Effective July 1, 1940

(3929)

BLANK PAGE

cuit Court of Appeals felt compelled to its conclusion by certain decisions of the Supreme Court of the United States. An accurate ascertainment of the scope of such language can be best revealed by a study of the cases which required it. The essential question here is: Does such decision control intrastate activities of the kind involved in the case at bar? I think not.

The cases relied upon by the Circuit Court of Appeals to compel its conclusion are as follows: *Mulford v. Smith*, 307 U. S. 38. In this case we find this statement in headnote 2 (1):

The statute does not purport to control production, but regulates commerce in tobacco through marketing.

Kentucky Whip & Collar Co. v. Illinois Etc. RR., 299 U. S. 334. This was an exercise of the power of Congress to aid states in the enforcement of state laws.

Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1. In headnotes 7 and 8 of this case we find this statement of one of the principles controlling in such case:

7. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control.

8. This power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace would then, in view of our complex society, effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.

Curran v. Wallace, 306 U. S. 1. After stating the regulation we find the following in headnote 2, subheads (1), (2), (3), and (4):

(1) Such regulation, for the protection of sellers or purchasers, or both, is within the commerce power as respects the selling for transportation to other states or abroad; and in view of the manner of the selling at the auctions, where all transactions are conducted indiscriminately and virtually at the same time, Congress was authorized to apply its regulation to intrastate sales in order to make it effective as to the sales in interstate and foreign commerce.

(2) The auction is a part of the sales consummated, notwithstanding that in the market practice the growers are not bound to accept bids, and in some instances reject them.

(3) Regulations under the commerce clause may have the quality of police regulations.

(4) The inspection and grading under the Act, though they take place before the auc-

tion, have immediate relation to the sales in interstate and foreign commerce.

Santa Cruz Co. v. Labor Board, 303 U. S. 453. On page 454 (headnotes 6 and 7), the following principle is stated:

(6) Where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.

(7) This principle is essential to the maintenance of our constitutional system.

Brooks v. United States, 267 U. S. 432. The extent of this decision is thus stated in headnote 1:

The Act punishing the transportation of stolen motor vehicles in interstate or foreign commerce is within the power of Congress.

Lottery Case (Champion v. Ames, No. 2), 188 U. S. 321. The decision arose on a habeas corpus proceeding and the extent of the decision is stated in headnote 3, as follows:

Legislation prohibiting the carriage of such tickets is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

Hammer v. Dagenhart, 247 U. S. 251. The import of this decision may be well understood from the following headnotes:

The power to regulate interstate commerce is the power to prescribe the rule by

which the commerce is to be governed; in other words, to control the means by which it is carried on.

* The manufacture of goods is not commerce, nor do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to the control of Congress.

All except the two cases of *Brooks v. United States* and *Champion v. Ames*, above referred to, were civil cases and opportunity was afforded and used to investigate the facts connected with the alleged violations of law involved. In each case it was held that the particular facts therein authorized the law.

On June 5, 1939, the Supreme Court decided the case of *United States v. Rock Royal Co-operative*, 307 U. S. 533, which also was a civil case. The particular challenge involved in such case is the regulation of "the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant." It was held that such sale could be controlled, but the principle authorizing such control is that stated in headnote 11, page 536:

Where milk sold by the dairy farmer locally and milk from other States are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens, and obstructions arising from excessive surplus and the social and

sanitary evils created by low prices, the power of Congress extends also to the local sales.

In the case at bar there are no charges of facts which bring the alleged violations within the ambit of which would make interstate commerce out of which is primarily intrastate activities. The controlling facts alleged which affect every charge made as to interstate commerce, is no stronger than this, namely:

4. At all times hereinafter referred to, a large proportion of the lumber bought, procured, obtained, produced, and manufactured by the defendant was bought, procured, obtained, produced, and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia. The said lumber was bought, procured, obtained, produced and manufactured with the intent on the part of the defendant that the said lumber after having been bought, procured, obtained, produced and manufactured would be sold, shipped, transported and delivered to and the said lumber was sold, shipped, transported and delivered to customers without the State of Georgia. In buying, procuring, obtaining, producing, and manufacturing the said lumber, the defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

There is no charge as to when the intent to ship was formed or abandoned; there is no charge that

at the time of the production there was in existence any contract making the shipment a part of interstate commerce, and even as to the indefinite charge that "a large proportion of the lumber bought, procured, obtained, produced and manufactured by the defendant was bought, procured, obtained, produced and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia" there is no charge that such orders were of such an amount or nature as to directly affect interstate commerce or to become a flow of commerce or to come within any of the other conditions which would make the production of lumber, disconnected from interstate commerce at the time of production, a part of interstate commerce and subject to control by Congress.

The indictment charges that production was complete and that sale in interstate commerce was not made until *after* the production was completed. The essential constitutional question in reference to the interstate commerce clause is as to the meaning of the language of the Act, Sec. 6:

Every employer shall pay to each of his employees who is engaged in commerce or in the *production of goods for commerce* wages at the following rates [*italics ours*].

If the language "in the production of goods for commerce" be limited to production which at the time of production was directly connected with interstate commerce or was coupled with some act or

acts pertaining to and making such production a part of interstate commerce the Act is constitutional; but if the Act means, as this indictment charges, that the mere intent at the time of production that *after* production it may or will be sold in interstate commerce in part or in whole makes it a part of interstate commerce the Act is unconstitutional. See *Hammer v. Dagenhart, supra*, declaring that manufacture is not commerce and intent to subsequently sell in interstate commerce does not make manufacturing commerce; and *Labor Board v. Jones & Laughlin, supra*, declaring that intrastate activities cannot be controlled under the interstate commerce clause unless such activities have "such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions."

The indictment charges nothing more than failure to pay minimum wages in *production* of goods with *intent* that such goods *after* production was completed would be connected with interstate commerce. There are no allegations notifying the defendant that such production in intrastate activities was so connected with interstate commerce as to justify the control of Congress under the commerce clause of the constitution.

No man should be put on trial in a criminal case unless he knows definitely what is the charge against him. In the absence of such definiteness as

would justify the law under the interstate commerce clause the indictment must fall.

If Congress can under the interstate commerce clause provision of the constitution regulate state activities only when connected with interstate commerce or affecting interstate commerce in some of the ways and to the extent limited by decisions of the United States Supreme Court why should not the act of Congress so declare? Otherwise, and if the indictments are drawn similar to the one at bar, defendants would not be notified of the crimes with which they are charged. Under the interpretation of the indictment before us and of the Fair Labor Standards Act as urged by the government the regulation of labor would embrace not only (by illustration in the present case) the man who cut the timber or hauled it to the mill but also the man who planted the seed and cultivated the trees. If the interstate commerce clause carries with it such power to thus create a centralized government as against an "indestructible union composed of indestructible states" (*Texas v. White*, 74 U. S. 725) the sooner it is known the better. It is my opinion that Congress has not yet gone to that extent and that if it has the Act is unconstitutional. Therefore the decision in the *Opp* case, which dealt with a situation where investigation had been had and findings promulgated, does not apply to a case of the kind at bar.

It therefore follows that the indictment is quashed.

In view of the conclusion thus reached it is unnecessary to consider other constitutional questions that have been raised.

This 27th day of April, 1940:

(Signed) Wm. H. BARRETT,

United States Judge.

Endorsement: Criminal Indictment No. 9175,
Opinion Of Court upon Demurrer to Indictment.
Filed in Clerk's Office at Savannah, April 30, 1940.

BLANK PAGE

BLANK PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	8
Argument	18
I. The Fair Labor Standards Act is a valid exercise of the commerce powers of Congress	19
A. The distribution in interstate commerce of goods produced under substandard labor conditions creates a national commercial problem, which the individual states cannot solve	20
1. The background	20
2. 1930-1937	25
3. The Fair Labor Standards bill	32
4. The lumber industry	35
5. The legislative findings	38
6. The legal limitations	41
B. The commerce clause was designed to give Congress power to regulate commercial matters, of national concern which are beyond the competence of the individual states	43
1. The Federal Convention	43
2. The words of the Constitution	50
3. Judicial recognition	54
C. Section 15 (a) (1) is a valid exercise of the com- merce powers of Congress	59
1. Prohibition of interstate shipment is a regulation of commerce	61
2. Harmless commodities	61
3. The purpose of the prohibition against interstate shipments	62
4. Section 15 (a) (1) does not regulate production	65
5. <i>Hammer v. Dagenhart</i>	67

II

Argument—Continued.

I. The Fair Labor Standards Act, etc.—Continued.

	Page
D. Section 15 (a) (2) is a valid exercise of the commerce power of Congress.....	70
1. The section is an appropriate means by which to keep the interstate channels free of goods produced under substandard conditions.....	71
2. The section prevents unfair competition in or affecting interstate commerce.....	75
3. The question is settled by the Labor Board cases.....	80
4. The section prevents labor disputes obstructive of interstate commerce.....	82
5. The cases relied upon by appellee.....	85
E. Sections 11 (c) and 15 (a) (5) are valid.....	89
II. The Fair Labor Standards Act does not violate the Tenth Amendment.....	90
1. The adoption of the Tenth Amendment.....	91
2. The judicial history of the Amendment.....	96
III. The Fair Labor Standards Act does not violate the Fifth Amendment.....	99
A. The question is properly before this Court.....	99
B. The Act does not unduly limit liberty of contract.....	101
C. The Act is not arbitrary because its basic minimum is nation-wide.....	109
D. The Act is not invalid because of its agricultural exemption.....	113
E. The Act is not indefinite.....	117
Conclusion.....	118
Appendix A:	
1. The Statute.....	119
2. The Pertinent Regulations.....	142
Appendix B—Tables showing causes of labor disputes.....	151

CITATIONS

Cases:

<i>Adair v. United States</i> , 208 U. S. 161.....	56
<i>Adkins v. Children's Hospital</i> , 261 U. S. 525.....	105, 107, 108
<i>Aero Mayflower Transit Co. v. Georgia Public Service Commission</i> , 295 U. S. 285.....	114
<i>Alco-Zander Co. v. Amalgamated Clothing Workers</i> , 35 F. (2d) 203.....	84
<i>Aluminum Co. of Am. v. Federal Trade Commission</i> , 284 Fed. 401, certiorari denied, 261 U. S. 616.....	79
<i>American Can Co. v. Ladoga Canning Co.</i> , 44 F. (2d) 763, certiorari denied, 282 U. S. 899.....	77, 79

III

Cases—Continued.

	Page
<i>Anderson v. United States</i> , 171 U. S. 604.....	56
<i>Andrews v. Montgomery Ward & Co.</i> , 30 F. Supp. 380, affirmed July 18, 1940.....	19
<i>Apex Hosiery Co. v. Leader</i> , October Term, 1939, No. 638.....	38,
	78, 80, 88
<i>Arrow-Hart and Hegeman Electric Company v. Federal Trade Commission</i> , 291 U. S. 587.....	79
<i>Ashton v. Cambron County District</i> , 298 U. S. 513.....	90, 97
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U. S. 288.....	98
<i>Associated Industries of Oklahoma v. Industrial Welfare Commission</i> , 90 P. (2d) 899.....	106
<i>Associated Press v. National Labor Relations Board</i> , 301 U. S. 103.....	83, 98
<i>Atty.-Gen. for Canada v. Atty.-Gen. for Ontario</i> [1937] A. C. 326.....	58
<i>Australian Boot Trade Federation v. Whybrow & Co.</i> , 11 C. L. R. 311.....	58
<i>Baldwin v. Seelig</i> , 294 U. S. 511.....	10, 42
<i>Baltimore & Ohio R. Co. v. Interstate Commerce Commission</i> , 221 U. S. 612.....	89, 102
<i>Bartlett Frazier Co. v. Hyde</i> , 65 F. (2d) 350, certiorari denied, 290 U. S. 654.....	89
<i>Bosley v. McLaughlin</i> , 236 U. S. 385.....	102
<i>Bowie v. Claiborne</i> , December 26, 1939 (D. C. Puerto Rico).....	19
<i>Bradley Lbr. Co. v. National Labor Relations Board</i> , 84 F. (2d) 97, certiorari denied, 299 U. S. 559.....	81
<i>Brooks v. United States</i> , 267 U. S. 432.....	62, 64, 65, 68, 101
<i>Bunting v. Oregon</i> , 243 U. S. 426.....	102, 107
<i>Carlisle Lumber Co. v. National Labor Relations Board</i> , 94 F. (2d) 138, certiorari denied, 304 U. S. 575.....	81
<i>Carlisle Lbr. Co. v. National Labor Relations Board</i> , 99 F. (2d) 553, certiorari denied, 306 U. S. 646.....	81
<i>Carmichael v. Southern Coal & Coke Co.</i> , 301 U. S. 495.....	114, 115
<i>Carroll v. Greenwich Ins. Co.</i> , 199 U. S. 401.....	115
<i>Carter v. Carter Coal Co.</i> , 298 U. S. 238.....	15,
	30, 46, 50, 56, 69, 85, 86, 87
<i>Carter v. United States</i> , 38 F. (2d) 227, certiorari denied, 281 U. S. 753.....	74
<i>Chamber of Commerce of Minneapolis v. Federal Trade Commission</i> , 13 F. (2d) 673.....	78
<i>Champion v. Ames</i> , 188 U. S. 321.....	55, 61, 64, 97
<i>Chicago Board of Trade v. Olsen</i> , 262 U. S. 1.....	41, 57, 68, 89
<i>Cincinnati Soap Co. v. United States</i> , 301 U. S. 308.....	97
<i>Clover Fork Coal Co. v. National Labor Relations Board</i> , 97 F. (2d) 331.....	86

Cases—Continued.

	Page
<i>Connolly v. Union Sewer Pipe Co.</i> , 184 U. S. 540.....	114
<i>Consolidated Edison Co. v. National Labor Relations Board</i> , 305 U. S. 197.....	80, 81, 87
<i>Coronado Coal Co. v. United Mine Workers</i> , 268 U. S. 295.....	87, 88
<i>Currin v. Wallace</i> , 306 U. S. 1.....	61, 63, 65, 73, 101
<i>The Daniel Ball</i> , 10 Wall. 557.....	55
<i>Duplex Printing Press Co. v. Deering</i> , 254 U. S. 443.....	78, 84
<i>Edwards v. United States</i> , 91 F. (2d) 767.....	87
<i>Electric Bond & Share Co. v. Commission</i> , 303 U. S. 419.....	12, 61, 62
<i>Employers' Liability Cases</i> , 207 U. S. 463.....	55, 56
<i>Everard's Breweries v. Day</i> , 265 U. S. 545.....	72, 73, 97
<i>Federal Trade Commission v. Bunte Bros.</i> , 110 F. (2d) 412.....	79
<i>Federal Trade Commission v. Eastman Kodak Company</i> , 7 F. (2d) 994, affirmed on another ground, 274 U. S. 619.....	78
<i>Federal Trade Commission v. Keppel & Bro.</i> , 291 U. S. 303.....	77
<i>Federal Trade Commission v. Raladam Co.</i> , 283 U. S. 643.....	40, 78
<i>Federal Trade Commission v. Western Meat Company</i> , 272 U. S. 554.....	79
<i>Fleming v. Hawkeye Pearl Button Co.</i> , 113 F. (2d) 52.....	19, 114
<i>Fleming v. Montgomery Ward & Co.</i> , decided July 18, 1940, certiorari pending, No. 407.....	19, 89
<i>Gibbons v. Ogden</i> , 9 Wheat. 1.....	11, 52, 54, 55, 63, 64, 69
<i>Gooch v. United States</i> , 297 U. S. 124.....	64
<i>Gordon v. United States</i> , 117 U. S. 697.....	97
<i>Hammer v. Dagenhart</i> , 247 U. S. 251.....	13, 23, 56, 61, 67, 68, 69
<i>Hawley v. Walker</i> , 232 U. S. 718.....	102
<i>Heald v. District of Columbia</i> , 259 U. S. 114.....	115
<i>Heisler v. Thomas Colliery Co.</i> , 260 U. S. 245.....	87, 115
<i>Helsering v. Davis</i> , 301 U. S. 619.....	97
<i>Hill v. Wallace</i> , 259 U. S. 44.....	68
<i>Hipolite Egg Co. v. United States</i> , 220 U. S. 45.....	64
<i>Hitchman Coal & Coke Co. v. Mitchell</i> , 245 U. S. 229.....	84
<i>Hoke v. United States</i> , 227 U. S. 308.....	64
<i>Holden v. Hardy</i> , 169 U. S. 366.....	102
<i>Honore v. Porto Rican Express Co., Inc.</i> , April 1, 1940 (D. C. Puerto Rico).....	19
<i>Hopkins v. United States</i> , 171 U. S. 578.....	56
<i>Hopkins Savings Association v. Cleary</i> , 296 U. S. 315.....	90, 97
<i>Houston v. St. Louis Independent Packing Co.</i> , 249 U. S. 479.....	74
<i>Huddart Parker Ltd. v. The Commonwealth</i> (1931), 44 C. L. R. 492.....	58
<i>Humphrey's Executor v. United States</i> , 295 U. S. 602.....	41
<i>International Organization v. Red Jacket C. C. & C. Co.</i> , 18 F. (2d) 839, certiorari denied, 275 U. S. 536.....	84
<i>International Shoe Company v. Federal Trade Commission</i> , 280 U. S. 291.....	79
<i>Interstate Commerce Commission v. Goodrich Transit Co.</i> , 224 U. S. 194.....	89

Cases—Continued.

Page

<i>Jacobs v. Peavy-Wilson Lumber Co.</i> , 33 F. Supp. 206.....	19
<i>Kentucky Whip & Collar Co. v. Illinois Central R. Co.</i> , 299 U. S. 334.....	12, 61, 62, 63, 65, 68, 69, 101
<i>Kidd v. Pearson</i> , 128 U. S. 1.....	55, 87
<i>Langnes v. Green</i> , 282 U. S. 531.....	99
<i>Leisy v. Hardin</i> , 135 U. S. 100.....	42
<i>Local 167 v. United States</i> , 291 U. S. 293.....	78
<i>Magnano Co. v. Hamilton</i> , 292 U. S. 40.....	67
<i>M. & M. Wood Working Co. v. National Labor Relations Board</i> , 101 F. (2d) 938.....	81
<i>Martin v. Hunter's Lessee</i> , 1 Wheat. 304.....	16, 96
<i>Mayor of New York v. Miln</i> , 11 Pet. 102.....	55
<i>McCray v. United States</i> , 195 U. S. 27.....	67
<i>McCulloch v. Maryland</i> , 4 Wheat. 316.....	49, 71, 96
<i>McDermott v. Wisconsin</i> , 228 U. S. 115.....	74
<i>Metal Trades Employers' Assoc. v. Amalgamated Engineering Union</i> , 36 C. A. R. 534.....	58
<i>Metropolitan Ins. Co. v. Brownell</i> , 294 U. S. 580.....	101
<i>Miller v. Wilson</i> , 236 U. S. 373.....	102
<i>Minnesota Rate Cases</i> , 230 U. S. 352.....	12, 55, 56
<i>Morgan v. Atlantic Coast Line Railroad</i> , 32 F. Supp. 617.....	19, 99
<i>Mulford v. Smith</i> , 307 U. S. 38.....	12, 13, 56, 61, 62, 65, 66, 68, 69, 73, 91, 97, 98
<i>Müller v. Oregon</i> , 208 U. S. 412.....	102
<i>Nash v. United States</i> , 229 U. S. 373.....	118
<i>National Harness Mfrs. Assn. v. Federal Trade Commission</i> , 268 Fed. 705.....	78
<i>National Labor Relations Board v. Biles-Coleman Lbr. Co.</i> , 94 F. (2d) 197, 98 F. (2d) 16, 98 F. (2d) 18.....	81
<i>National Labor Relations Board v. Bradford Dyeing Co.</i> , No. 388, Oct. Term, 1939.....	86
<i>National Labor Relations Board v. Carlisle Lbr. Co.</i> , 108 F. (2d) 188.....	81
<i>National Labor Relations Board v. Connor Lbr. & Land Co.</i> , 102 F. (2d) 998.....	81
<i>National Labor Relations Board v. Crossett Lbr. Co.</i> , 102 F. (2d) 1003.....	81
<i>National Labor Relations Board v. Crowe Coal Co.</i> , 104 F. (2d) 633, certiorari denied, 308 U. S. 584.....	86
<i>National Labor Relations Board v. Fainblatt</i> , 306 U. S. 601.....	80, 86, 87
<i>National Labor Relations Board v. Fruehauf Trailer Co.</i> , 301 U. S. 49.....	80, 86
<i>National Labor Relations Board v. Friedman-Harry Marks Clothing Co.</i> , 301 U. S. 58.....	80, 86
<i>National Labor Relations Board v. Good Coal Co.</i> , 110 F. (2d) 591, certiorari denied, May 6, 1940.....	86

Cases—Continued.

	Page
<i>National Labor Relations Board v. Jones & Laughlin Steel Corp.</i> , 301 U. S. 1.....	56, 57, 68, 75, 80, 85, 86, 87, 88, 98
<i>National Labor Relations Board v. Meadow Valley Lbr. Co.</i> , 101 F. (2d) 1014.....	81
<i>National Labor Relations Board v. Red River Lbr. Co.</i> , 109 F. (2d) 157, 110 F. (2d) 810.....	81
<i>Nebbia v. New York</i> , 291 U. S. 502.....	101
<i>Northern Securities Co. v. United States</i> , 193 U. S. 197.....	78, 79, 97
<i>O'Gorman & Young v. Hartford Fire Insurance Co.</i> , 232 U. S. 251.....	102
<i>Oklahoma v. Woodring</i> , 309 U. S. 623.....	91
<i>Olinger Iron Mining Co. v. Lord</i> , 262 U. S. 172.....	115
<i>Opp Cotton Mills v. Administrator</i> , 111 F. (2d) 23, certiorari pending, No. 330, October Term, 1940.....	19
<i>Otis v. Parker</i> , 187 U. S. 606.....	72
<i>Perkins v. Lukens Steel Co.</i> , 310 U. S. 113.....	32
<i>Pittsburgh Melting Co. v. Tolten</i> , 248 U. S. 1.....	74
<i>Pittsburgh Terminal Coal Corp. v. United Mine Workers</i> , 22 F. (2d) 559.....	84
<i>Premier Pabst Sales Co. v. Grosscup</i> , 298 U. S. 226.....	115
<i>Purity Extract and Tonic Co. v. Lynch</i> , 226 U. S. 192.....	72, 73
<i>Quinones v. Central Igualdad, Inc.</i> , Feb. 7, 1940 (D. C. Puerto Rico).....	19
<i>Railroad Commission of Texas v. Rowan & Nichols Oil Co.</i> , No. 681, October Term, 1939.....	103
<i>Railroad Retirement Board v. Alton R. Co.</i> , 295 U. S. 330.....	67
<i>Riley v. Massachusetts</i> , 232 U. S. 671.....	102
<i>Rogers v. Glazer</i> , 32 F. Supp. 990.....	19
<i>Ruppert v. Caffey</i> , 251 U. S. 264.....	72
<i>St. John v. New York</i> , 201 U. S. 633.....	72
<i>Santa Cruz Fruit Packing Co. v. National Labor Relations Board</i> , 303 U. S. 453.....	14, 15, 57, 80, 86, 87, 88
<i>Schechter Poultry Corp. v. United States</i> , 295 U. S. 495.....	15, 29, 85
<i>Shreveport Case</i> , 234 U. S. 342.....	14, 73
<i>Sonzinsky v. United States</i> , 300 U. S. 506.....	67, 98
<i>Soon Hing v. Crowley</i> , 113 U. S. 703.....	115
<i>Stafford v. Wallace</i> , 258 U. S. 495.....	47, 56, 57
<i>Standard Oil Co. v. United States</i> , 221 U. S. 1.....	41, 56, 88
<i>Stettler v. O'Hara</i> , 243 U. S. 629.....	105
<i>Steward Machine Co. v. Davis</i> , 301 U. S. 548.....	97, 114
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , No. 804, October Term, 1939.....	69, 101
<i>Swift and Company v. United States</i> , 196 U. S. 375.....	57, 78
<i>Tagg Bros. & Moorhead v. United States</i> , 280 U. S. 420.....	56, 102
<i>Wright v. Union Central Life Ins. Co.</i> , 304 U. S. 502.....	98
<i>Temple Anthracite Coal Company v. Federal Trade Commission</i> , 51 F. (2d) 656.....	78, 79

VII

Cases—Continued.

	Page
<i>Texas Electric Railway Co. v. Easius</i> , 308 U. S. 637.....	56
<i>Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks</i> , 281 U. S. 548.....	56
<i>Thornhill v. Alabama</i> , 310 U. S. 88.....	38
<i>Thornton v. United States</i> , 271 U. S. 414.....	74
<i>Tigner v. Texas</i> , 310 U. S. 141.....	18, 114
<i>Townsend v. Yeomans</i> , 301 U. S. 441.....	102
<i>United Mine Workers v. Coronado Coal Co.</i> , 259 U. S. 344.....	78, 84, 87, 88
<i>United States v. Bekins</i> , 304 U. S. 27.....	91, 97
<i>United States v. Borden Co.</i> , 308 U. S. 188.....	17, 99, 100
<i>United States v. The Brigantine William</i> , 2 ^d Fed. Case No. 16700.....	63, 96
<i>United States v. Butler</i> , 297 U. S. 1.....	90, 97
<i>United States v. California</i> , 297 U. S. 175.....	98
<i>United States v. Carolene Products Co.</i> , 304 U. S. 144.....	41, 63, 65, 101
<i>United States v. Chicago Macaroni Co.</i> , December 4, 1939 (N. D. Ill.).....	19
<i>United States v. Curtiss-Wright Corp.</i> , 299 U. S. 304.....	17, 99, 100
<i>United States v. Delaware & Hudson Co.</i> , 213 U. S. 366.....	61
<i>United States v. E. C. Knight Co.</i> , 156 U. S. 1.....	56, 87, 88
<i>United States v. Feature Frocks, Inc.</i> , 33 F. Supp. 206.....	19
<i>United States v. Lewis</i> , 235 U. S. 282.....	74
<i>United States v. Patten</i> , 226 U. S. 525.....	78
<i>United States v. Rock Royal Cooperative, Inc.</i> , 307 U. S. 533.....	64, 101
<i>United States v. San Francisco</i> , 310 U. S. 16.....	41
<i>United States v. Sprague</i> , 282 U. S. 716.....	97
<i>United States v. Walters Lumber Co.</i> , 32 F. Supp. 65.....	19
<i>Van Camp & Sons v. American Can Co.</i> , 278 U. S. 245.....	77, 79
<i>Veasie Bank v. Fenno</i> , 8 Wall. 533.....	67
<i>Virginian Ry. Co. v. System Federation No. 40</i> , 300 U. S. 515.....	56, 115
<i>Waterside Workers Federation v. Comm. Steamship Owners Assoc.</i> , 28 C. L. R. 209.....	58
<i>West Coast Hotel Co. v. Parrish</i> , 300 U. S. 379.....	17, 28, 102, 103, 105, 106, 107, 108
<i>Westfall v. United States</i> , 274 U. S. 256.....	7
<i>Whitfield v. Ohio</i> , 297 U. S. 431.....	38, 39
<i>Williams v. Atlantic Coast Line Railroad</i> , Feb. 20, 1940 (E. D. N. C.).....	19
<i>Wilson v. New</i> , 243 U. S. 332.....	102
<i>Wisconsin R. R. Commission v. Chicago B. & Q. R. R. Co.</i> , 257 U. S. 563.....	73
<i>Wright v. Union Central Life Ins. Co.</i> , 304 U. S. 502.....	16

VIII

United States Statutes:

	Page
Sherman Act of 1890, c. 647, 26 Stat. 209.....	78
Act of May 29, 1884, c. 60, 23 Stat. 31.....	74
Joint Resolution No. 22 of July 20, 1892, 27 Stat. 399.....	21
Act of February 2, 1903, c. 349, 32 Stat. 791.....	74
Act of March 3, 1905, c. 1496, 33 Stat. 1264.....	74
Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (U. S. C., Title 21, Sec. 2).....	74
Act of January 29, 1907, c. 432, 34 Stat. 866.....	23
Meat Inspection Act of March 4, 1907, c. 2907, 34 Stat. 1256, 1260 (U. S. C., Title 21, Secs. 71, 72, 78).....	73
Clayton Act of October 15, 1914, c. 323, 38 Stat. 730.....	77
Sec. 2.....	79
Sec. 7.....	78
Child Labor Act of September 1, 1916, c. 432, 39 Stat. 875.....	23, 67, 68
Federal Trade Commission Act, c. 311, 38 Stat. 717.....	77, 78, 80
Agricultural Marketing Act of March 4, 1931; c. 520, as amended, 46 Stat. 1549, 1550 (U. S. C., Title 12, Sec. 1141j (g)).....	114, 116
National Industrial Recovery Act of June 16, 1933, c. 90, 48 Stat. 195.....	9, 26, 28
National Labor Relations Act of July 5, 1935, c. 372, 49 Stat. 449.....	81
Agricultural Adjustment Act of August 24 1935, c. 641, Sec. 8 (c) (2) (6), 49 Stat. 750, 754 (U. S. C., Title 7, Sec. 608c (2) (6)).....	116
Guffey Coal Act of August 30, 1935, c. 824, 49 Stat. 991.....	26
Walsh-Healey Public Contracts Act of June 30, 1936, c. 881, 49 Stat. 2036 (U. S. C., Title 41, Supp. V, Secs. 35-45).....	31
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 U. S. C., Title 29, Sec. 201 <i>et seq.</i> ;	
Sec. 1.....	119
Sec. 2.....	39, 40, 82, 119
Sec. 3.....	7, 60, 70, 76, 114, 117, 119
Sec. 4.....	124
Sec. 5.....	124
Sec. 6.....	2, 3, 70, 117, 126
Sec. 7.....	2, 3, 70, 117, 128
Sec. 8.....	107, 110, 130
Sec. 9.....	134
Sec. 10.....	184
Sec. 11.....	3, 5, 15, 89, 136
Sec. 12.....	137
Sec. 13.....	18, 113, 114, 138
Sec. 14.....	107, 140
Sec. 15.....	3, 140

IX

United States Statutes—Continued.

Fair Labor Standards Act—Continued.

Sec. 15 (a):

(1)----- 12, 13, 14, 60, 71, 72, 75

(2)----- 13, 14, 15, 70, 80, 82

(5)----- 15, 89

Sec. 16----- 60, 142

Sec. 17----- 143

Sec. 18----- 143

Sec. 19----- 144

Joint Resolution of June 26, 1940, c. 432, 76th Cong., 3d

Seas----- 125

Foreign Statutes:

British North America Act, 1867, 30 & 31 Vict., c. 3; Secs.

91, 92----- 58

Commonwealth of Australia Constitution Act, 1900, Sec.

51----- 58

Dominion Act of 1935----- 57

Congressional Material:

1 Annals of Congress:

432----- 93

441----- 93

761, 767-768----- 95

2 Annals of Congress 1897----- 94

45 Cong. Rec. 5245----- 23

53 Cong. Rec:

1002----- 23

1571, 1575, 2014, 2029-2039, 12208----- 23

77 Cong. Rec.:

1350----- 27

3611----- 28

80 Cong. Rec.: 1002, 1009, 1010, 1018----- 31

81 Cong. Rec.:

7648----- 36

7648-7649, 7667, 7668, 7722, 7780, 7848, 7868----- 40

7660----- 116

7798-7795, 7850----- 113

7957----- 109

82 Cong. Rec.:

1387, 1391, 1395-1398, 1400, 1403-1404, 1470, 1472,

1482, 1487-1493, 1497, 1812-1813, 1832, 1835----- 119

1390, 1395, 1397, 1402, 1406, 1467-1468, 1473, 1478-

1479, 1497-1498, 1510, 1601, 1671, 1672-1673, 1807-- 40

1472, 1505, 1797-1798----- 111

1478----- 29

1487----- 28

1495----- 31

1499----- 113

Congressional Material—Continued

	Page
83 Cong. Rec.:	
7275-7526, 7573-7448.....	109
7276, 7279, 7290, 7307, 7308, 7324, 7382-7383, 7386, 9163, 9171, 9175, 9360, 9364.....	111
7284, 7286, 7290, 7291, 7298, 7299, 7312, 7316, 7317, 7324, 7418, 7435.....	40
7307-7308, 7382-7383, 9171, 9266.....	113
7316, 9173.....	29
7449-7450.....	109
9158-9165, 9246-9266.....	109
H. Doc. No. 398, 69th Cong., 1st Sess. (1927), <i>Documents Illustrative of the Formation of the Union of the American States (Madison's Debates)</i>	44, 45, 46, 51
Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, <i>The Fair Labor Standards Act of 1937</i>	28, 29, 32, 33, 34, 35, 115, 116, 117
Hearings before House Committee on the Judiciary, 74th Cong., 1st Sess., on S. 3055.....	31
Hearings before a subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., on H. R. 11554.....	32
Hearings before House Committee on Labor, 64th Cong., 1st Sess., on H. R. 8234.....	23
Hearings before House Committee on Labor, 73d Cong., 1st Sess., on S. 158 and H. R. 4557, <i>The Thirty Hour Week Bill</i>	27, 34
Hearings before a subcommittee of the House Committee on Labor, 74th Cong., 2d Sess., on H. R. 9072, <i>to Rehabili- tate and Stabilize Labor Conditions in the Textile Industry of the United States</i>	25, 31, 34
Hearings before House Committee on Ways and Means, 73d Cong., 1st Sess., H. R. 5664, <i>on National Industrial Recovery</i>	28, 34
Hearings before a subcommittee of the House Committee on Ways and Means, 74th Cong., 1st Sess., on H. R. 8479, <i>Stabilization of Bituminous Coal Mine Industry</i>	29
Hearings before Senate Finance Committee on S. 1712 and H. R. 5755, 73d Cong., 1st Sess.....	28, 34
H. Doc. No. 380, 57th Cong., 1st Sess., Vol. XIX, p. 922, <i>Report of the U. S. Industrial Commission on Regulations and Conditions of Capital and Labor</i> (1901).....	22
H. Doc. No. 158, 75th Cong., 1st Sess., <i>A Report on the Operation of the National Recovery Administration</i> , pp. 98, 108-110.....	28
H. R. 14082, 14105, 14518, 72d Cong., 2d Sess.....	27
H. R. 14518, 72d Cong., 2d Sess.....	26

XI

Congressional Material—Continued.

	Page
H. R. 4557, 73d Cong., 1st Sess.....	26
H. R. 8492, 73d Cong., 2d Sess.....	26
H. R. 7198, 74th Cong., 1st Sess.....	26
H. R. 9072, 11770, 12285, 74th Cong., 2d Sess.....	26
H. R. 238, 75th Cong., 1st Sess.....	26
H. Rept. No. 2309, 52d Cong., 2d Sess., <i>Report of the Committee on Manufacturers on the Sweating System (1893)</i>	22
H. Rept. No. 46, 64th Cong., 1st Sess., p. 13.....	23
H. Rept. No. 1999, 72d Cong., 2d Sess.....	26, 27
H. Rept. No. 24, 73d Cong., 1st Sess.....	26, 28
H. Rept. No. 889, 73d Cong., 2d Sess.....	26
H. Rept. No. 1550, 74th Cong., 1st Sess.....	26
H. Rept. No. 2590, 74th Cong., 2d Sess., <i>To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States</i>	26, 29
H. Rept. No. 238, 75th Cong., 1st Sess.....	26
H. Rept. No. 1452, 75th Cong., 1st Sess.....	109
H. Rept. No. 2738, 75th Cong., 3d Sess.....	82, 109
H. Rept. No. 2182, 75th Cong., 3d Sess.....	39, 82, 109
S. Doc. No. 645, 61st Cong., 2d Sess., <i>Report on Condition of Women and Child Wage Earners in United States (1911)</i>	23, 105
S. Doc. No. 126, 74th Cong., 1st Sess., <i>A Report on the Conditions and Problems of the Cotton Textile Industry, made by Cabinet Committee appointed by President of U. S. (August 21, 1935), pp. 46-47</i>	25
S. 5267, 72d Cong., 2d Sess.....	27
S. 2475, 75th Cong., 1st Sess.....	109
S. Rept. No. 358, 64th Cong., 1st Sess., p. 21.....	23
S. Rept. 584, 75th Cong., 1st Sess.....	109
U. S. Government Reports and Publications:	
Department of Agriculture, Forest Service, <i>Lumber Distribution and Consumption for 1936</i> , compiled by R. V. Reynolds and A. H. Pierson (1938), Table 5, pp. 19-24.....	35
Bureau of the Census, <i>Census of Manufacturers, 1937: Lumber and Timber Products</i>	37
Department of Labor:	
Bureau of Labor Statistics:	
Bulletin No. 75, <i>Industrial Hygiene</i> , by George M. Kober, pp. 534-536 (1908).....	104
Bulletin No. 407, <i>Wages and Hours of Labor in the Lumber Industry: 1928</i>	26
Bulletin No. 586, <i>Id.</i> , 1932.....	26, 37
<i>Labor in the Shirt Industry, 1933, Monthly Labor Review, September 1933, p. 499</i>	25

XII

U. S. Government Reports and Publications—Continued.

Department of Labor—Continued.

	Page
(Reprint from Monthly Labor Review), Serial No. R 698, p. 7, <i>Living Costs of Working Women in New York</i>	113
Serial No. R 963, Reprint from Monthly Labor Review, July 1939, <i>Differences in Living Cost in Northern and Southern Cities</i>	112
Secretary of Labor, Preliminary Report, pursuant to Senate Resolution 298, 74th Cong. (1938), <i>Migration of Workers</i>	24
Wage and Hour Division, Title 29, Chapter V, Code of Federal Regulations, Part 516.....	5, 70, 144
Wage and Hour Interpretative Bulletin No. 5, par., 2.....	70
Wage and Hour Interpretative Bulletin No. 14, p. 4.....	116
Wage and Hour Division, <i>Hearings Before Subcommittee of Apparel Industry Committee</i> , pp. 56-57, 62, 63.....	25
<i>Id.</i> , Supplement, 1939, Vol. II, pp. 102-104, 117, 133, 134-138.....	25
Women's Bureau:	
<i>The Employment of Women in the Sewing Trades of Connecticut</i> (1935), pp. 15-16.....	25
Bulletin No. 66-1:	
<i>History of Labor Legislation for Women in Three States</i> (1929) (taken from Massachusetts legislative documents, House No. 50, 1845).....	20, 21
Bulletin No. 167, <i>State Minimum Wage Laws and Orders: An Analysis</i> (1938).....	111
Supplement (1939).....	111
<i>State Minimum Wage Budgets for Women Workers Living Alone</i> , November 1938.....	111, 113
National Emergency Council, <i>Report on Economic Conditions of the South</i> , pp. 29-35 (1938).....	104
National Labor Relations Board, Division of Economic Research, <i>The Effect of Labor Relations in the Bituminous Coal Industry Upon Interstate Commerce</i> , Bulletin No. 2, June 30, 1938.....	84
National Recovery Administration:	
Hearings on Boot and Shoe Industry, <i>Study of the Causes of Migration from the State of Massachusetts</i> , January 22, 1935, pp. 297, 316-326, 344, 347, 348-352, 418-449, 452-453.....	24
Research and Planning Division, <i>Hours, Wages, and Employment under the Codes</i> (January 1935).....	28
<i>Report on the Operation of the National Industrial Recovery Act</i> (February 1935), pp. 33-40.....	28

XIII

U. S. Government Reports and Publications—Continued.

National Recovery Administration—Continued.

Public Health Service:

	Page
Bulletin No. 5.....	104
Bulletin No. 9.....	104
Public Health Bulletin No. 73, <i>Tuberculosis Among Industrial Workers</i> , pp. 16-17 (1916).....	104
Reprint #492, from Public Health Reports No. 47, Vol. 33, p. 16 (1918), <i>Disabling Sickness Among the Population of Seven Cotton-Mill Villages of South Carolina in Relation to Family Income</i>	104
Reprint No. 1656, Public Health Reports, Vol. 49, No. 44 (1934), <i>The Relation Between Housing and Health</i>	104
Report 1648 from Public Health Reports, Vol. 50, No. 18 (1935), <i>Relation of Sickness to Income and Income Change in Ten Surveyed Communities</i>	104
National Health Survey 1935-1936, Sickness and Medical Series, Bulletin No. 2 (1936).....	104
Public Bulletin No. 237 (1937), <i>Illness and Medical Care in Puerto Rico</i>	104

Works Progress Administration, Division of Research, <i>Intercity Differences in Cost of Living, 1935 (1937)</i>	111, 112, 113
--	---------------

State Investigations and Reports:

Cleveland Health Council, Howard Whipple Green, <i>Infant Mortality and Economic Status (1939)</i>	104
State of Connecticut Legislative Doc. No. 23, <i>Report of the Department of Labor on the Business and Conditions of Wage Earners in the State (1933)</i>	25
Massachusetts House Doc. No. 2045, Preliminary Report to the General Court of the Commission on Interstate Cooperation, <i>Concerning the Migration of Industrial Establishments from Massachusetts</i> , under Chap. 10, Resolutions of 1938.....	24, 25
State of Massachusetts, Governor's Committee on the Shoe Industry, Report by Gleason L. Archer, April 11, 1935.....	24
New York State, Crime Commission of, <i>From Truancy to Crime—A Study of 251 Adolescents (1928)</i>	105

Miscellaneous:

Alexander's Columbian Dictionary (1800).....	52
Anderson, Adam, <i>An Historical and Chronological Deduction of the Origin of Commerce</i> (Dublin, 1790), Vol. I.....	51
Articles of Confederation, Article II.....	94
1 Bancroft, <i>History of the Formation of the Constitution of the United States (1882)</i> , 250.....	43
Barnard, J. L., <i>Factory Legislation in Pennsylvania: Its History and Administration</i> , Publications, Univ. Pa. Series in Pol. Econ. and Pub. Law, No. 19 (1907), p. 14.....	20

Miscellaneous—Continued.

Bowden, <i>Hours and Earnings before and after the N. R. A.</i> , Monthly Labor Review (January 1937), pp. 13-36.....	2
Caldwell, M. G., <i>The Economic Status of Families of Delinquent Boys in Wisconsin</i> , American Journal of Sociology, September, 1931, Vol. 37, No. 2, p. 239.....	10
Cartar, Goodrich, and others, <i>Migration and Economic Opportunity</i> (1936).....	2
Commons, John R. and Associates, <i>Documentary History of American Industrial Society</i> (1910), Vol. VIII, p. 202 ..	2
Corwin, <i>Congress's Power to Prohibit Commerce, a Crucial Constitutional Issue</i> (1933), 18 Corn. L. Q. 447, 502.....	5
Daugherty, C. R., <i>Labor Problems in American Industry</i> (1938), pp. 138-145.....	11
Douglas, Paul H., <i>Wages and the Family</i> (1925).....	11
Elliot, <i>Debates on the Federal Constitution:</i> Vol. I.....	43, 91, 92, 9
Vol. II.....	47, 48, 92, 93, 9
Vol. III.....	48, 92, 9
Vol. IV.....	92, 9
Epstein, Abraham, <i>Insecurity, A Challenge to America</i> (1938), pp. 97-98.....	11
Federal Council of the Churches of Christ in America, <i>The Family, Past and Present</i> , pp. 355-356 (1938) (edited by Bernhard Stern).....	10
Florence, P. Sargent, <i>Economics of Fatigue and Unrest</i> , p. 329 (1924).....	10
Frankfurter, Felix, and Josephine Goldmark, <i>The Case for the Shorter Work Week</i> (1915), pp. 63-359.....	10
Funk & Wagnall's Standard Dictionary (1928 ed.).....	5
Goldmark, Josephine, <i>Fatigue and Efficiency</i> (1912).....	10
Hamilton, Walton H., and Douglass Adair, <i>The Power to Govern</i>	50, 5
Hamilton, <i>The Federalist</i> , No. XXXIV.....	49, 5
Hamilton and Madison, <i>The Federalist</i> , Nos. VII, IX, XII.....	4
Hoyt, Elizabeth Ellis, <i>Consumption in our Society</i> (1938), p. 305.....	11
Jennings, W. Ivor, <i>Constitutional Interpretation—The Experience of Canada</i> , 51 Harv. L. Rev. 1.....	5
Johnson's, Samuel, Dictionary (6th ed., 1785).....	5
7 Journals of Cont. Cong., 122-123.....	9
Keir, Robert Malcolm, <i>Labor's Search for More</i> (1938), pp. 455, 456.....	2
Keir, Robert Malcolm, <i>Manufacturing</i> (1928).....	2
Kellogg, W. K., <i>Five Years Under the Six-Hour Day</i> (1936), p. 15.....	10

Miscellaneous—Continued.

	Page
Kober, George M., <i>Etiology and Prophylaxis of Occupational Diseases</i> (taken from <i>Diseases of Occupational and Vocational Hygiene</i>), pp. 447-448 (1916).....	105
Koelsch, Dr. Franz, <i>Arbeit and Tuberkulose, Archiv fur Soziale Hygiene</i> (1911), Vol. 1, p. 212.....	105
Lee, F. S., <i>The Human Machine and Industrial Efficiency</i> , p. 45 (1918).....	105
Madison's Debates. (See H. Doc. No. 398, p. X.)	
Mitchell, B. and G. S., <i>The Industrial Revolution in the South</i> (1930).....	25
Mitchell, B. and G. S., <i>The Plight of the Cotton Mill Labor</i> , American Labor Dynamics, edited by J. B. S. Hardman (1928), Chap. XVIII.....	25
Mosso, H., <i>Fatigue</i> (1904).....	105
National Housing Association, Proceedings of the Eighth National Conference on Housing (1920), <i>Room Overcrowding and its Effect upon Health</i> , Henry F. Vaughan, Commissioner of Health, Detroit, Mich.....	104
National Industrial Conference Board:	
Bulletin, Vol. XII, No. 10, Oct. 17, 1938.....	112, 113
<i>Differentials in Industrial Wages and Hours in the United States</i> (1938).....	112
Research Report No. 22 (1919).....	112
Special Report No. 8 (1920).....	112
Perry's Royal Standard English Dictionary (4th Am. ed. 1796).....	52
Social Science Research Council, Collins and Tibbits, <i>Research Memorandum on Social Aspects of Health in the Depression</i>	104
Spaeth, R. A., <i>The Problem of Fatigue</i> , Journal of Industrial Hygiene, p. 37, May 1919.....	105
Stern, <i>That Commerce Which Concerns More States Than One</i> , 47 Harv. L. Rev. 1335.....	43
Stokes, Thomas L., <i>Carpet Baggers of Industry</i> , 1937.....	25
Story, <i>Commentaries on the Constitution</i> (4th ed. 1873):	
Sec. 459 et seq.....	54
Secs. 1079-1089.....	63
Sec. 1082.....	69
Secs. 1907-1908.....	95
Sutherland, E. H., <i>Criminology</i> , p. 169 (1924).....	105
A View of the United States of America * * * between the years 1787 and 1794 * * * the whole tending to exhibit the progress and present state of civil and religious liberty, population, agriculture, exports, imports, fisheries, navigation, ship-building, manufactures, and general improvement. London, 1795. First published in Philadelphia, 1794, p. 7.....	51

Miscellaneous—Continued.

	Page
Warren, <i>The Making of the Constitution</i> (1928):	
82.....	49
85.....	43
769.....	91
Warren, <i>The Supreme Court in United States History</i> , Vol. I, pp. 341-350.....	63
Webster's Dictionary:	
1st ed. 1806.....	52
1841 ed.....	52
1931 ed.....	52
1939 ed.....	50
Woodbury, A. M., <i>Infant Mortality and its Causes</i> (1926).....	104

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 82

THE UNITED STATES OF AMERICA, APPELLANT

v.

F. W. DARBY LUMBER COMPANY AND FRED W.
DARBY

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 16) is reported in 32 F. Supp. 734.

JURISDICTION

The judgment below was entered May 6, 1940 (R. 21). The order allowing appeal was filed May 13 (R. 22) and probable jurisdiction noted June 3, 1940. The jurisdiction of this Court is based upon the Criminal Appeals Act (U. S. C., Title 18, Sec. 682) and Section 238 of the Judicial Code as amended (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

1. Whether Congress has constitutional power:
(a) to prohibit the shipment in interstate commerce of lumber produced under specified substandard labor conditions; and (b) to prescribe minimum rates of pay and maximum hours of work for employees engaged in the production of lumber for interstate commerce.
2. Whether the provisions of the Fair Labor Standards Act as applied to the appellee violate the due process clause of the Fifth Amendment.¹

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060, U. S. C., Title 29, Sec. 201 *et seq.* The Act and the applicable Regulations are set forth in Appendix A, *infra*, p. 119. For the convenience of the Court the salient provisions of the Act pertinent here are briefly summarized.

Section 6 provides that every employer shall pay to each of his employees who is engaged in interstate commerce, or in the production of goods for that commerce, a wage of not less than twenty-five cents an hour during the first year after the effective date of the section. Section 7 provides that during the same year those employees shall not be

¹ This question, though not passed upon by the lower court, was raised by appellee in its demurrer and seems properly to be before this Court. See *infra*, p. 99.

employed for longer than forty-four hours per week without receiving compensation at one and one-half times the regular rate of pay for hours in excess of forty-four. The minimum wage and the maximum hours are to be gradually increased and decreased, respectively, after the first year.

Section 11 (c) requires employers subject to the Act to keep such records of the wages and hours of their employees as are prescribed by administrative regulation.

Section 15 provides that it shall be unlawful for any person (1) to transport or sell in interstate commerce, or sell with knowledge that shipment in interstate commerce is intended, goods in the production of which the wage or hour standards of the Act have been violated; (2) to violate any of the provisions of Sections 6 or 7, which establish such standards; or (3) to violate the provisions of Section 11 (c).

STATEMENT

The appellee was indicted on November 2, 1939, for the violation of various provisions of the Fair Labor Standards Act. The indictment contains nineteen counts (R. 1-14).

Paragraphs 1 to 8 of the first count (R. 1-2) are incorporated by reference in each succeeding count. These paragraphs allege that the F. W. Darby Lumber Company, of Statesboro, Georgia, is an unincorporated company owned by and under the

4

active control of Fred W. Darby¹ (Pars. 1 and 2). The company and Darby are engaged in the business of buying, producing, manufacturing, and selling lumber. In the course of the business they receive orders for lumber, obtain the raw material (by purchase or cutting), convert it by various processes into manufactured lumber, and sell it (Par. 3). A large proportion of defendant's lumber was bought, produced, and manufactured pursuant to orders received from customers outside of Georgia with the intent on defendant's part that after obtaining and manufacturing the lumber it would be sold, shipped, transported, and delivered to points outside the State of Georgia; thus "the defendant produced and transported goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938" (Par. 4).

It is further alleged that Darby and his employees were employer and employees, respectively, within the meaning of the Fair Labor Standards Act (Pars. 5 and 6), and that at all times referred to in the indictment a large proportion of the employees were engaged in the production and manufacture of lumber for interstate commerce (Par. 7).

Count 1 of the indictment charges, in Paragraph 9, that during the week beginning March 3, 1939, defendant Darby employed one Levy Weaver "in

¹ Fred W. Darby is the only defendant. The Darby Lumber Company was not made a defendant although it was named in the caption of the indictment.

the buying, procuring, obtaining, producing, and manufacturing of goods, to wit, lumber, for interstate commerce," and failed to pay him the prescribed minimum wage of twenty-five cents per hour for that period (R. 3). Counts 2 and 3 are identical, except for the name of the employee and the period of time covered (R. 3-4). Counts 4 to 11 differ from the above only in that they charge that during specified weeks defendant failed to pay named employees one and one-half times the regular rate of pay for hours worked in excess of forty-four per week (R. 4-9).

Count 12, Paragraph 2, avers that the Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to the provisions of Section 11 (c) of the Act, issued regulations, described as Title 29, Chapter V, Code of Federal Regulations, Part 516, requiring every employer subject to the Act to keep records showing the hours worked each day and week by each of his employees. Paragraph 3 then charges that the defendant unlawfully failed to keep such records for his employees, including employees engaged "in the production and manufacture of goods, to wit, lumber, for interstate commerce" (R. 10).

Count 13 alleges that on or about March 7, 1939, defendant transported, shipped, and delivered from a point in Georgia to Gainesville, Florida, an identified shipment of lumber "which the defendant had cut and produced by Daniel P. Gay, knowing that in the cutting and production * * *,"

Gay intended the said lumber would be shipped in interstate and foreign commerce, and that Daniel B. Gay employed in the production of said lumber, employees, within the meaning of the Fair Labor Standards Act, to whom he failed to pay wages at a rate not less than twenty-five cents (25¢) an hour" (R. 11). Counts 14 to 16 make the same allegations with respect to shipments of lumber to New York City, Orangeburg, South Carolina, and Toledo, Ohio (R. 11-12).

Count 17 alleges that on or about March 7, 1939, the defendant transported, shipped, and delivered from a point within the State of Georgia to a point within the State of Florida identified lumber "manufactured and produced for interstate commerce, in the production and manufacture of which the defendant had employed employees to whom the defendant had failed to pay wages at a rate not less than twenty-five (25¢) an hour" (R. 13). Count 19 contains a similar charge with respect to a shipment to the State of Ohio (R. 14). Count 18 is also the same as Count 17, except that it alleges that defendant shipped lumber in interstate commerce in the production of which he had employed employees in excess of forty-four hours per week without paying them time and a half for hours in excess of forty-four (R. 13).

On February 16, 1939, appellee filed a demurrer to the indictment (R. 14-16), asserting that the Act was unconstitutional because it did not fall within any of the powers granted to Congress in

Article I, Section 8, of the Constitution and because it violated the Fifth, Sixth, and Tenth Amendments.² The demurrer also alleged that the indictment did not set forth facts showing a violation of any valid statute of the United States, that it failed to advise defendant of the nature of the charge against him, that it failed to charge that the "manufacture, production, or sale of lumber is trade or commerce among the several States or constitutes interstate commerce", and that in certain details the indictment was not sufficiently definite.

The demurrer was argued on February 16, 1940, and on April 27 the District Court rendered an opinion sustaining the demurrer and quashing the indictment (R. 16-20). The opinion considers only the question of interstate commerce, and concludes that application of the Act to the facts alleged in the indictment is unconstitutional. The essence of the opinion seems to be the following passage (R. 19):

* * * The essential constitutional question in reference to the interstate commerce clause is as to the meaning of the language of the Act, Sec. 6:

"Every employer shall pay to each of his employees who is engaged in commerce or

² In the court below appellee abandoned a claim under the Eighth Amendment. Appellee also conceded that in view of a stipulation of counsel Paragraph 7 of his demurrer, which attacked the validity of Section 3 (m) of the Act, need not be considered.

in the *production of goods for commerce* wages at the following rates" [italics ours].

If the language "in the production of goods for commerce" be limited to production which at the time of production was directly connected with interstate commerce or was coupled with some act or acts pertaining to and making such production a part of interstate commerce the Act is constitutional; but if the Act means, as this indictment charges, that the mere intent at the time of production that after production it may or will be sold in interstate commerce in part or in whole makes it a part of interstate commerce, the Act is unconstitutional. * * *

SUMMARY OF ARGUMENT

I

The Fair Labor Standards Act is a valid exercise of the commerce power of Congress. This conclusion is required both by the character of the economic problem, as measured against the broad purpose of the commerce clause, and by the decisions of this Court which sanction the particular provisions of the Act here attacked.

A

1. State legislators, Congressional committees, federal commissions, and businessmen over a long period of time have realized that no state, acting alone, could require labor standards substantially

higher than those obtaining in other states whose producers and manufacturers competed in the interstate market.

2. The reiterated conclusion that the individual states were helpless gained added force during the prolonged economic depression of the 1930's. The Thirty-Hour Week bills, the National Industrial Recovery Act, the textile and the coal bills, and the Fair Labor Standards Act itself each reflect a great volume of testimony adduced at congressional hearings and elsewhere to the effect that employers with lower labor standards possess an unfair advantage in interstate competition, and that only the national government could deal with the problem. The lumber industry itself affords a dramatic illustration of the inability of the particular states to insure adequate labor standards; over 57 percent of the lumber produced enters into interstate or foreign commerce from 45 of the states.

3. The Congressional committees made specific findings which were embodied in the Fair Labor Standards Act as the congressional judgment that low labor standards were detrimental to the health and efficiency of workers, caused the channels of interstate commerce to spread those labor conditions among the states, burdened interstate commerce, led to labor disputes obstructing that commerce, and constituted an unfair method of competition. Particularly when these findings accord with the facts of which this Court has already

taken judicial notice, they are to be given conclusive weight.

4. The incapacity of the individual states to remedy the serious evils resulting from long hours and low wages in interstate industry rests in part upon the commerce clause itself, which prevents the states from forbidding importation of goods produced under substandard conditions. *Baldwin v. Seelig*, 294 U. S. 511. And, even if a state could constitutionally protect its industries within its own borders, it could not safeguard them against the loss of their markets in other states.

B

The commerce clause was designed to empower the national government to deal with such problems.

1. The Virginia Resolution, directing that the national government be empowered "to legislate in all cases to which the separate states are incompetent," was three times approved by the Federal Convention, and indeed, was amplified to authorize Congress "to legislate in all cases for the general interests of the union." The Committee of Detail translated these broad principles into the enumerated powers. The failure of the Convention to object to this change in structure can reasonably be interpreted only to mean that the Convention understood that the enumerated powers, including the commerce clause, placed within the jurisdiction

of the national government control over those problems which are national in scope.

2. Examination of the expression "commerce among the several states" in the light of the etymology of 1787 shows that the phrase at that time had a meaning equivalent to "the inter-related business transactions of the several states." Lexicographers, economists, and authors used the term "commerce" to refer not only to the narrow concept of sale or exchange, but to include the entire moneyed economy, embracing production and manufacture as well as exchange. Moreover, the men who met in Philadelphia did not create an instrument fitted to cope only with the exigencies of their time; they realized that the Constitution must apply in a "remote futurity," bringing "contingencies * * * illimitable in their nature," and desired that it be capable of achieving in the future the great purposes set out in the Sixth Resolution and carried over into the Preamble.

3. The decisions of this Court, from their very beginning, have recognized that the commerce clause gives Congress power to meet the economic problems of the nation, whatever they may be. Marshall's basic criterion has never been bettered: Congress has power over "that commerce which concerns more states than one," including "those internal concerns which affect the states generally," in contrast to "the completely internal commerce of a state." *Gibbons v. Ogden*, 9 Wheat. 1,

the committee described in vivid terms the degrading and deleterious effects of low labor standards and concluded "that so long as interstate commerce in this regard is left free, the stamping out of the sweating system in any particular State is practically of no effect, except to impose peculiar hardship upon the manufacturers of that State."⁹ Exercise of "the full jurisdiction of the Federal Government over interstate commerce" was recommended.¹⁰

The report of the U. S. Industrial Commission in 1901 declared:¹⁰

Uniform, or at least similar, legislation in the various States is especially desirable in the case of laws restricting child labor, because insofar as the employment of children is a real economy, it gives manufacturers in the States where it is permitted an unfair advantage over those in the States having child-labor laws.

In 1907 the evils caused by the labor of women and children were deemed a sufficiently serious national problem for Congress to authorize another investi-

⁹ House Rept. No. 2309, 52d Cong. 2d Sess., Report of the Committee on Manufacturers on the Sweating System (1893), p. XXIV.

¹⁰ *Id.*, at XXI.

¹¹ H. Doc. 380, 57th Cong., 1st Sess., Report of the U. S. Industrial Commission on *Regulations and Conditions of Capital and Labor* (1901), Vol. XIX, p. 922.

gation; this resulted in a nineteen-volume report in 1910 and 1911.¹¹

Recognition of the inability of the individual states to cope with the problem of child labor resulted in the passage of the Child Labor Act of September 1, 1916 (39 Stat. 675), which was later declared invalid by a closely divided Court. *Hammer v. Dagenhart*, 247 U. S. 251. In the hearings and debates preceding the passage of that law, witnesses and congressmen reiterated that every attempt by a state legislature to protect children was "met by the cry from the manufacturers, 'State legislation is unfair. You ask us to compete with other States of different standards. This interstate competition will ruin our business. If we must advance, let us advance together.'"¹² The Senate Committee Report in favor of the Child Labor Bill stated:¹³

So long as there is a single State which for selfish or other reasons fails to enact effec-

¹¹ 34 Stat. 866; S. Doc. No. 645, 61st Cong., 2d Sess., *Report on Condition of Women and Child Wage Earners in the United States*.

¹² Hearings before the House Committee on Labor, 64th Cong., 1st Sess., on H. R. 8234, p. 270. See also H. Rept. No. 46, 64th Cong., 1st Sess., p. 13, 53 Cong. Rec. 1571, 1575, 2014, 2029-2039, 12208, Appendix, Pt. 14, pp. 206, 212, 239, 245, 257, Pt. 15, p. 1807. And see the memorials presented by Massachusetts (45 Cong. Rec. 5245) and Ohio (53 Cong. Rec. 1002). The material on this point is collected in the brief for the Government in *Hammer v. Dagenhart*, October Term, 1917, No. 704, pp. 10-35.

¹³ S. Rept. No. 358, 64th Cong., 1st Sess., p. 21.

194-195. See, also, *Minnesota Rate Cases*, 230 U. S. 352, 398. Under the protection of this clause, and the decisions of this Court, our markets have become national rather than local. Labor conditions, so far from being the concern of the individual states alone, can now adequately be regulated only by Congress. The commerce clause, in incapacitating the states, gives the requisite power to Congress.

C

1. Section 15 (a) (1) forbids the interstate shipment of goods produced under substandard labor conditions. The provision is on its face a regulation of interstate commerce, and therefore within the powers of Congress. *Mulford v. Smith*, 307 U. S. 38; *Electric Bond and Share Co. v. Commission*, 303 U. S. 419, 442; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334, 347.

None of the objections advanced to this obvious conclusion have substance; we shall consider each in turn.

2. It can no longer be asserted that the power of Congress to restrict or condition interstate commerce is limited to articles in themselves harmful or deleterious. *Mulford v. Smith*, *supra*; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, *supra*.

3. The suggestion that Congress cannot regulate interstate commerce for ends which do not concern commerce itself is also unavailing. The Fair La-

bor Standards Act, intended to prevent unfair competition and the spread of harmful conditions in interstate commerce, has a goal which is commercial in the strictest sense. But, even if the Act were concerned simply with humanitarian ends, it would none the less be within the commerce power.

4. The argument that Section 15 (a) (1) is an invalid regulation of production because it will affect the manner in which goods are produced is destroyed by the decision in *Mulford v. Smith*, *supra*, where the Court sustained the power of Congress to regulate the amount of tobacco marketed, despite the obvious effect of the regulation upon the amount produced on the farm. The power of Congress is measured by what it regulates, not by what it affects.

5. *Hammer v. Dagenhart*, 247 U. S. 251, is wholly inconsistent with the subsequent decisions of this Court, which have repudiated or abandoned each premise upon which the opinion rests.

If it were to be reaffirmed, there again would appear a "no man's land" in which both the states and Congress are incompetent to act; the Constitution contemplates no such result.

D

Section 15 (a) (2) forbids violation of the provisions which fix wages and hours to be observed in the production of goods for interstate commerce. It is valid under any of several analyses.

1. Section 15 (a) (2) is an appropriate means by which to keep the interstate channels free of goods produced under substandard conditions. The direct prohibition of interstate shipment found in Section 15 (a) (1) is implemented and enforced by the provisions of Section 15 (a) (2), which prohibit such conditions in the production of goods for interstate commerce. It is familiar doctrine that intrastate acts lie within the power of Congress when necessary effectively to control interstate transactions, and Congress need not wait until transportation commences in its effort to protect the flow of commerce. *Shreveport Case*, 234 U. S. 342.

2. Again, even if Section 15 (a) (2) were entirely independent of Section 15 (a) (1), it would constitute a valid control over unfair competition in interstate commerce. Employers who exploit substandard labor conditions gain an unfair advantage which diverts interstate trade to them at the expense of their competitors. Congress may regulate methods of competition in interstate commerce regardless of the intrastate situs of the transactions giving the competitive advantage.

3. The simplest answer to appellee's attack is that Section 15 (a) (2) deals with employer-employee relationships which have already been established by the Labor Board cases as within the federal commerce power. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453.

4. Moreover, the Labor Board cases are controlling because Congress has found that Section 15 (a) (2) will diminish the obstructions to interstate commerce which flow from labor disputes. The most frequent occasions for disruptive strikes, as indicated both by official investigations and by the decisions of this Court, are the conditions caused by low wages and long hours. If Congress can forbid one important cause of labor disputes which obstruct commerce, the refusal of employers to accept collective bargaining, it has corresponding power to correct substandard labor conditions, the other major cause of obstructive labor disputes.

5. Neither *Schechter Poultry Corp. v. United States*, 295 U. S. 495, nor *Carter v. Carter Coal Co.*, 298 U. S. 238, is controlling here. The *Schechter* case applied only to local activities after interstate commerce had ended. The *Carter Coal* case is wholly inconsistent with the subsequent decisions of this Court, in particular *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, and should now be overruled.

E

Sections 11 (c) and 15 (a) (5), requiring employers to keep records and forbidding them to make false reports, are plainly ancillary to the regulatory sections of the Act and their constitutionality inevitably follows that of the substantive provisions.

II

Since the Fair Labor Standards Act is a valid exercise of the power granted Congress to regulate interstate commerce, there is no room for the Tenth Amendment to operate. That amendment in terms merely reserves to the States "the powers not delegated to the United States."

1. That the Amendment is not a limitation upon the exercise of the powers which are delegated to the federal government is confirmed by the history of its adoption. Its purpose, as then expressed, was merely to declare that the central government was to be one of delegated powers; it was viewed as unnecessary, but it was considered that "there can be no harm in making such a declaration."

2. The plain purpose of the Amendment has been recognized by more than a century of constitutional litigation. From *Martin v. Hunter's Lessee*, 1 Wheat. 304, 325, to *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 516, the Court has repeatedly recognized that the Tenth Amendment adds nothing to the Constitution. A few of the relatively recent decisions of this Court suggesting a contrary view cannot be taken to have overruled *sub silentio* so important a constitutional doctrine.

III

The Fair Labor Standards Act does not violate the Fifth Amendment.

A

The question of due process is properly before this Court. *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 330; cf. *United States v. Borden Co.*, 308 U. S. 188, 207.

B

The Fair Labor Standards Act does not unduly limit liberty of contract. The decisions sustaining the power of the states to enact comparable legislation are fully applicable under the Fifth Amendment. This Court has sustained legislation fixing maximum hours for both men and women, and minimum wages for women generally and for men under certain circumstances. The only remaining question, that of a statute providing for minimum wages for men generally, is clearly governed by the other decisions. As the Court recognized in the *West Coast Hotel Co.* case, the legislature must be competent to prevent the injuries to health and general welfare which flow from low wages as well as from long hours. Facts of common knowledge, together with technical and statistical studies in great volume, all show that the health and welfare of both the worker and the nation depend upon the elimination of substandard conditions.

C

Appellee's objection that the Act is arbitrary because it establishes a uniform minimum standard

for the entire nation could be sustained only if it could be proved that the amount selected was so high that no rational person could regard it as suitable. The minimum wage of 25 cents an hour during the first year and 30 cents during the six subsequent years is obviously not unreasonably high. It is less than the wages fixed by minimum-wage boards and less than the estimates of the minimum amounts necessary for subsistence, whatever region of the country be selected.

D

The exemption, in Section 13 (a) (6), of an employee engaged in agriculture can no longer be thought to make the statute unconstitutional. *Tigner v. Texas*, 310 U. S. 141. The particular complaint that the producers of naval stores are exempt while lumber manufacturers, who also work on pine trees, are subject to the Act ignores the substantial testimony before Congress that the production of gum naval stores is an agricultural operation while lumber production is not.

E

The objection that the Fair Labor Standards Act is void because of its indefiniteness is without merit.

ARGUMENT

The constitutionality of the Fair Labor Standards Act has been passed upon by one circuit court

of appeals¹ and by eight district judges.² Except in the instant case, the Act has uniformly been held to be valid.

I

THE FAIR LABOR STANDARDS ACT IS A VALID EXERCISE OF THE COMMERCE POWERS OF CONGRESS

To assay the constitutionality of the Fair Labor Standards Act, it is desirable, in the first instance, to refer to the nature of the economic problems with which the Act deals and to explain the significance of those problems in terms of constitutional history. Accordingly, this brief first will show that, as a practical matter, labor conditions under which goods are produced for interstate sale create

¹ *Opp Cotton Mills v. Administrator*, 111 F. (2d) 23 (C. C. A. 5th), certiorari pending, No. 330. The Act has also been given effect by the Circuit Court of Appeals for the Seventh Circuit in *Fleming v. Montgomery Ward & Co.*, decided July 18, 1940, certiorari pending, No. 407, and by the Circuit Court of Appeals for the Eighth Circuit in *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52.

² *United States v. Walters Lumber Company*, 32 F. Supp. 65 (S. D. Fla.); *Jacobs v. Peavy-Wilson Lumber Co.*, 33 F. Supp. 206 (W. D. La.); *Andrews v. Montgomery Ward & Co.*, 30 F. Supp. 380 (N. D. Ill., Holly, J.); affirmed, July 18, 1940; *United States v. Feature Frocks, Inc.*, 33 F. Supp. 206 (N. D. Ill., Woodward, J.); *United States v. Chicago Macaroni Co.*, Dec. 4, 1939 (N. D. Ill., Barnes, J.); *Williams v. Atlantic Coast Line Railroad*, Feb. 20, 1940 (E. D. N. C.); *Morgan v. Atlantic Coast Line Railroad*, 32 F. Supp. 617 (S. D. Ga.); *Bowie v. Olaiborne*, Dec. 26, 1939 (D. C. Puerto Rico); *Quinones v. Central Igualdad, Inc.*, Feb. 7, 1940 (D. C. Puerto Rico); *Honore v. Porto Rican Express Co., Inc.*, April 1, 1940 (D. C. Puerto Rico); cf. *Rogers v. Glazer*, 32 F. Supp. 990 (W. D. Mo.). The first two of the above cases dealt with the lumber industry.

a commercial and economic problem which the states cannot solve. The history of the commerce clause shows that such problems were intended to fall within the scope of the powers granted to Congress. The brief will then deal with the specific provisions of the statute under attack and show that those provisions lie well within the powers of Congress as defined by the decisions of this Court.

A. THE DISTRIBUTION IN INTERSTATE COMMERCE OF GOODS PRODUCED UNDER SUBSTANDARD LABOR CONDITIONS CREATES A NATIONAL COMMERCIAL PROBLEM, WHICH THE INDIVIDUAL STATES CANNOT SOLVE.

1. *The Background.*—The interstate labor problem, although increasing in intensity in recent years, is almost as old as interstate competition. As early as 1838 witnesses before a Pennsylvania investigating committee “expressed their fear that any reduction of the hours of labor, or the prohibition of child labor, so long as it could apply only to Pennsylvania, must result disastrously to manufacturers in their competition with others not similarly restricted.”¹ A Massachusetts legislative investigation in 1845,² and a Pennsylvania

¹ “*Factory Legislation in Pennsylvania: Its History and Administration*,” by J. L. Barnard, Publications, Univ. Pa., Series in Pol. Econ. and Pub. Law, No. 19 (1907), p. 14.

² United States Department of Labor, Women’s Bureau Bulletin No. 66-1, *History of Labor Legislation for Women in Three States* (1929), p. 14 (taken from Massachusetts legislative documents, House No. 50, 1845). The investigation was directed at a proposal for a ten-hour day for women.

manufac
point. A
feated in
ground t
into som
many ho
hour we
Massach
textile i
chusetts
disadvan
ing state
and the
back of
not affe
fifty-eigh
industry
upon ma
“their co
form reg
In 1895
of Wool
and reco
In 189
sweatsho

³ John I
of Americ
⁴ Women
⁵ Women
⁶ *Id.*, p.
⁷ *Id.*, p.

urers' resolution in 1848,³ made the same gain, in the 1370's ten-hour bills were de-Massachusetts; they were opposed on the at "they would drive the best operatives other state where they could work as rs as they pleased."⁴ By 1890 the sixty-k had become generally established in setts, but a fifty-eight-hour week in the dustry was opposed because⁵ "Massa-
* * * was just recovering from the ages of having to compete with neighbor-that had labor standards lower than hers, textile industry could not afford the set-another reduction of hours which would t, competitors; * * *." After the -hour law was passed, representatives of urged that it placed a "special hardship" ufacturers in Massachusetts because of npetitors in other states," and that uni-lation on a national basis was essential.⁶ e Secretary of the National Association anufacturers made a similar complaint mendation.⁷

Congress ordered an investigation of the system (27 Stat. 399). The report of

Commons and Associates, *Documentary History of Industrial Society* (1910), Vol. VIII, p. 202.
Bureau Bulletin No. 66-1, *supra*, note 2, p. 18.
Bureau Bulletin No. 66, pp. 29-30.

tive child-labor legislation, it is beyond the power of every other State to protect effectively its own producers and manufacturers against what may be considered unfair competition of the producers and manufacturers of that State, or to protect its consumers against unwittingly patronizing those who exploit the childhood of the country.

The effect of low labor standards upon competition in interstate commerce was illustrated by the diversion of business to states where manufacturers were free to treat their employees the least favorably. Production of shoes in Massachusetts decreased tremendously because of the advantages in competition possessed by establishments in Maine, New Hampshire, and midwestern states with lower labor standards.¹⁴ A similar diversion of trade occurred in the clothing industry from factories in

¹⁴ With respect to the migration of the shoe industry from its established center in Massachusetts and also from large cities in Wisconsin to areas of lower wages, see State of Massachusetts, Governor's Committee on the Shoe Industry, Report by Gleason L. Archer, April 11, 1935; Preliminary Report of the Secretary of Labor, pursuant to Senate Resolution 298, 74th Cong. (1938), *Migration of Workers*; Massachusetts House Doc. No. 2045, Preliminary Report to the General Court of the Commission on Interstate Cooperation, *Concerning the Migration of Industrial Establishments from Massachusetts*, under Chap. 10, Resolutions of 1938; Robert Malcolm Keir, *Manufacturing* (1928); National Recovery Administration, Hearings on Boot and Shoe Industry, *Study on the Causes of Migration from the State of Massachusetts*, January 22, 1935, pp. 297, 316-326, 344, 347, 348-352, 418-449, 452-453.

New York City to small towns in Pennsylvania, New Jersey, Connecticut, and the South where labor standards were lower.¹⁵ And the diversion of trade in the textile industry from the North to the South is of common knowledge.¹⁶

2. 1930-1937.—The prolonged economic depression of the 1930's produced a much more insistent demand for federal legislation fixing labor stand-

¹⁵ State of Connecticut Legislative Doc. No. 23, *Report of the Department of Labor on the Business and Conditions of Wage Earners in the State* (1933); United States Department of Labor, Women's Bureau, *The Employment of Women in the Sewing Trades of Connecticut* (1935), pp. 15-16; United States Department of Labor, Bureau of Labor Statistics, *Labor in the Shirt Industry*, 1933, Monthly Labor Review, September 1933, p. 499; Thomas L. Stokes, *Carpet Baggers of Industry*, 1937; United States Department of Labor, Wage and Hour Division: *Hearings before Subcommittee of Apparel Industry Committee*, pp. 56-57, 62, 63; Supplement to Meeting of Apparel Industry Committee, 1939, Vol. II, pp. 102-104, 117, 133, 134-138.

¹⁶ B. & G. S. Mitchell, *The Industrial Revolution in the South* (1930); B. & G. S. Mitchell, "The Plight of the Cotton Mill Labor," in *American Labor Dynamics*, edited by J. B. S. Hardman (1928), Chap. XVIII; S. Doc. 126, 74th Cong., 1st Sess., *A Report on the Conditions and Problems of the Cotton Textile Industry*, made by the Cabinet Committee appointed by the President of the United States (August 21, 1935), pp. 46-47; Massachusetts House Doc. 2045, *supra*, note 14, pp. 11-18; Robert Malcolm Keir, *Labor's Search for More* (1938), pp. 455, 456; United States House of Representatives, Subcommittee of the Committee on Labor, 74th Cong., 2nd Sess., *Hearings on H. R. 9072, to Rehabilitate and Stabilize Labor Conditions in the Textile Industry in the United States*; Carter, Goodrich, and others, *Migration and Economic Opportunity* (1936).

ards. The familiar and vicious spiral set in by which prices were cut to obtain a market; to meet the lower prices, labor costs were cut by reducing wages and prolonging hours; the competitive advantage thus obtained vanished as other producers did the same; and the whole process was repeated once again. The resulting loss in purchasing power of the workers led to widespread unemployment, which in turn forced the worker to accept any amount offered. In the lumber industry, for example, the average wages for unskilled laborers in Georgia dropped from \$9.71 in 1928¹⁷ to \$3.76 per week in 1932.¹⁸ By 1932 the average wage for the laborers in Georgia was 9.4 cents per hour.¹⁹

The hearings before congressional committees held in connection with the proposed thirty-hour-week bills,²⁰ the National Industrial Recovery Act (48 Stat. 195), the Ellenbogen Bill for the regulation of the textile industry,²¹ the first Guffey Coal Act (49 Stat. 991), and the Fair Labor Standards Act itself, are replete with statements as to the un-

¹⁷ United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 497, *Wages and Hours of Labor in the Lumber Industry: 1928*, p. 35.

¹⁸ *Id.*, Bulletin No. 586 (1932), p. 32.

¹⁹ *Ibid.*

²⁰ H. R. 14518, 72d Cong., 2d Sess.; H. R. 4557, 73d Cong., 1st Sess.; H. R. 8492, 73d Cong., 2d Sess.; H. R. 7198, 74th Cong., 1st Sess.; see H. Repts.: No. 1999, 72d Cong., 2d Sess.; No. 24, 73d Cong., 1st Sess.; No. 839, 73d Cong., 2d Sess.; No. 1550, 74th Cong., 1st Sess.

²¹ H. R. 9072, 11770, 12285, 74th Cong., 2d Sess.; H. Rept. No. 2590, 74th Cong., 2d Sess.; H. R. 238, 75th Cong., 1st Sess.

fair competitive advantage accruing to the employers with lower labor standards, the interstate nature of the competition, the consequent lack of capacity of the states to remedy the situation, and the necessity for federal action.

In December 1932 the thirty-hour-week bill was first introduced in the 72nd Congress, 2nd Session, and favorably reported.²² The bill was reintroduced in the 73rd Congress, 1st Session, and hearings were held. The statement of the representative of the clothing manufacturers of Rochester, New York, is typical of the many remarks²³ urging the necessity of federal labor legislation. He stated that:²⁴

Today the manufacturers with the longest hours and lowest wages set a standard which the whole industry must try to meet if it is to get its share of the nation's business.

* * * * *

The establishment of a national minimum wage rate and standard of hours is the only effective method of combating this tendency in business today.

The thirty-hour-week bill passed the Senate on April 6, 1933.²⁵ The bill never came to a vote in

²² S. 5267, H. R. 14082, 14105, 14518, H. Rept. No. 1999, 72d Cong., 2d Sess.

²³ See Note 45, *infra*, p. 34.

²⁴ Hearings, House Committee on Labor, 73d Cong., 1st Sess., on S. 158 and H. R. 4557, *Thirty-hour Week Bill*, pp. 825-826.

²⁵ 77 Cong. Rec. 1350.

the House, although favorably reported,²⁶ since the bill which became the National Industrial Recovery Act was given consideration instead.²⁷

The hearings and debates on the National Industrial Recovery Act showed that it was intended to reach the problem of interstate competition in conditions of employment. Senator Wagner stated²⁸ that its purpose was "to eliminate destructive practices, unfair practices, competition in the reduction of wages, and the lengthening of hours * * *". Industrial leaders agreed.²⁹

The National Industrial Recovery Act required that all codes contain provisions for minimum wages and maximum hours. While that Act was in effect, there was a substantial improvement in labor conditions.³⁰ After the Act was invalidated by

²⁶ H. Rept. No. 24, 73d Cong., 1st Sess.

²⁷ 77 Cong. Rec. 3611. See 82 Cong. Rec. 1487.

²⁸ Hearings before House Ways and Means Committee on H. R. 5664, 73d Cong., 1st Sess., p. 84.

²⁹ Henry I. Harriman, President of the United States Chamber of Commerce, *id.*, at 134; Mr. Geddes, General Manager of the Radio Manufacturers' Association, Hearings before Senate Finance Committee on S. 1712 and H. R. 5755, 73d Cong., 1st Sess., p. 63.

³⁰ House Doc. 158, 75th Cong., 1st Sess., *A Report on the Operation of the National Recovery Administration*, pp. 98, 108-110; National Recovery Administration, Research and Planning Division, *Hours, Wages, and Employment under the Codes* (January 1935); *id.*, *Report on the Operation of the National Industrial Recovery Act* (February 1935), pp. 33-40; Hearings on the Fair Labor Standards Act, note 40, *infra*, at 157.

this Court in May 1935,³¹ bills were introduced to establish some form of regulation for the coal and textile industries in order to prevent recurrence of the cycle of falling wages and lengthening hours.

At the hearings on the Guffey Coal bill a representative of the United Mine Workers testified,³² with the corroboration of a spokesman for the coal operators,³³ that—

You cannot have an eight-hour day in one competing district, a ten-hour day in another, and a six-hour day in another.

* * * None of these bituminous districts desire to make any wage negotiations at all unless they are involved in what you would call a competitive wage relationship * * *.

They want to know just what the wage will be in Pennsylvania before they make a contract in West Virginia; what it will be in Ohio, where they are selling their coal; what

³¹ *Schechter Poultry Corp. v. United States*, 295 U. S. 495. For testimony as to the decline in standards after this decision, see Hearings on the Fair Labor Standards Act, *infra*, Note 40, pp. 159-160 (testimony of Leon Henderson), 310-316 (testimony of Isador Lubin); House Rept. No. 2590, 74th Cong., 2d Sess., *To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States*, pp. 4-8; 82 Cong. Rec. 1478, 83 Cong. Rec. 7316, 9173; Bowden, *Hours and Earnings before and after the N. R. A.*, Monthly Labor Review (January 1937), pp. 13-36.

³² Hearings before a subcommittee of the House Committee on Ways and Means, 74th Cong., 1st Sess., on H. R. 8479, *Stabilization of Bituminous Coal Mine Industry*, pp. 88-89 (testimony of Henry Warrum).

³³ *Id.*, at p. 171 (testimony of Charles O'Neill).

it will be in Illinois or Indiana, or in Kentucky.

The effect of differences in wage rates upon the flow of coal in interstate commerce is vividly brought out by the findings of the trial court in *Carter v. Carter Coal Co.*, 298 U. S. 238. The court found³⁴ from the record in that case, which contained an extensive analysis and description of conditions in the coal industry, that between the years 1923 and 1929 shipments of coal from Pennsylvania, Ohio, Illinois and Indiana decreased 52,-800,000 tons, while shipments from West Virginia, Kentucky, and Virginia increased 50,300,000 tons. This was because—

/The shift or diversion of shipments after 1923 from the northern to the southern group was primarily due to a reduction of f. o. b. mine prices in the South more rapidly than in the North * * *. The relatively lower southern f. o. b. mine prices after 1923 were due primarily to the greater reductions in wage rates, which the southern employers, operating on a non-union basis substantially throughout this period, were able to effect.

The court concluded³⁵ that “in the bituminous coal industry cutting of wage rates is the predominant

³⁴ See *Carter v. Carter Coal Co.*, October Term, 1935, No. 636, Transcript of Record, pp. 181-183, Findings of Adkins, J.

³⁵ *Id.*, at p. 211.

and most effective method of gaining competitive advantages."

Substantially the same competitive situation for the textile industry was described at the hearings on the Ellenbogen Bill introduced in both the 74th and 75th Congresses.³⁶ Governor Earle, of Pennsylvania, stated that³⁷—

No single State or group of States can cope with the problem of cutthroat competition in any industry whose product is even partially in the stream of interstate commerce.

There was a vast amount of testimony to the same effect.³⁸

After invalidation of the N. R. A. codes, Congress required that the award of Government contracts be made to bidders who would comply with prevailing minimum labor standards, in order to prevent persons with the lowest standards of labor from underbidding their competitors and thus obtaining Government contracts.³⁹ The competitive

³⁶ See note 21, *supra*, p. 26. Consideration of the textile bill was halted when it was determined to pass a general wage-and-hour bill (82 Cong. Rec. 1495).

³⁷ Hearings before a subcommittee of the House Committee on Labor, 74th Cong., 2d Sess., on H. R. 9072, *to Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States*, p. 539.

³⁸ See note 45, *infra*, p. 34.

³⁹ The purpose of the Walsh-Healey Public Contracts Act, 49 Stat. 2036, U. S. C., Title 41, Supp. V, Secs. 35-45, to eliminate competition in labor standards appears plainly from its legislative history. See 80 Cong. Rec. 1002, 1000, 1010, 1018; Hearings before House Committee on the Ju-

MICRO

TRADE



MICROCA EDITIONS, I

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE

CARD

3

CARD

MARK



R D[®]
INC.

ND MICROFICHES
(202) 333-6393

m
microcard[®]



advantage of such persons would extend, of course, to private interstate sales as well as to sales to the Government.

3. *The Fair Labor Standards Bill.*—Finally, the bill which became the Fair Labor Standards Act, applying to interstate business generally, was introduced. Although the hearings held during the previous five years on related legislation might well have been regarded as giving Congress sufficient factual basis for a new act dealing with wages and hours, extensive hearings were again held, and over twelve hundred pages of testimony were taken.⁴⁰ It seems sufficient to give a few excerpts from this voluminous mass of testimony.

The president of the manufacturing firm of Johnson and Johnson testified that:

* * * In all the discussions which have taken place regarding better wages and shorter hours, I have heard but one good

diciary, 74th Cong., 1st Sess., on S. 3055, pp. 16, 79-82, 116-117, 364, 378; Hearings before a subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., on H. R. 11554, pp. 153-156, 190, 211, 222-223, 266-270, 282-283, 336, 360-361, 442-446, 529-530. Excerpts from the debates and hearings on this Act are collected in the Appendix to the petitioner's brief, pp. 20-60, in *Perkins v. Lukens Steel Co.*, 310 U. S. 113.

⁴⁰ See Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, *bills to Provide for the Establishment of Fair Labor Standards in Employment in and Affecting Interstate Commerce.*

⁴¹ *Id.*, at p. 95 (testimony of Robert Johnson).

reason for paying low wages and working long hours, and that is because some competitor down the street is doing so. * * *

A former member of the New York State Minimum Wage Board explained " that state minimum wage orders had largely been restricted to service industries and retail stores, in substantial part because—

administering State wage laws we have had to realize that a neighboring State holds open arms to an employer who feels the pressure of higher standards at home.

* * * It is because of this competition which extends beyond State boundaries that Federal regulation of labor standards in interstate commerce is necessary—not as a substitute for State regulation, but as an addition to it.

A member of the Wisconsin Trades Practice Commission declared that: "

* * * We have in several instances been confronted with inability to maintain State standards of wages and hours and minimum cost prices because of interstate commerce competition, and we have no doubt that we will be confronted with many more instances as we meet the demands of numerous industries that have for months been knocking at our doors for standards and as more of the understandard operators become alert to

⁴² *Id.*, at p. 365 (testimony of Elinore M. Herrick).

⁴³ *Id.*, at p. 413 (testimony of Fred M. Wylie).

and take advantage of the over-the-State-line method of evading the State standards.

Dr. Isador Lubin, Commissioner of Labor Statistics, testified as to the effect of termination of the N. R. A. codes in the textile industry; he summarized his data as follows:⁴³

In other words, the firms that did not cut their wages lost business, and the firms that cut their wages 37 percent or more increased the actual amount of business as measured in man-hours of employment for their workers by about 60 percent.

These statements are representative of a body of testimony before Congress and available in official publications which would reach prodigious proportions even in summary; representative citations are set forth in the margin.⁴⁴ It seems suffi-

⁴³ *Id.*, pp. 312-313.

⁴⁴ See Hearings before the House Committee on Labor, 73rd Cong., 1st Sess., on S. 158 and H. R. 4557, *The Thirty Hour Week Bill*, pp. 15, 25-26, 93, 115, 169, 172-173, 212-213, 491-492, 496-497, 499, 501-504, 512-513, 533-534, 736-738, 741, 812, 814-816, 824-826, 838-839, 885-888, 961, 977-979; Hearings before House Committee on Ways and Means, 73rd Cong., 1st Sess., on *National Industrial Recovery*, pp. 9, 55-56, 80, 84, 88, 94, 122; Hearings before Senate Finance Committee on S. 1712 and H. R. 5755, 73rd Cong., 1st Sess., pp. 6, 63; Hearings before a subcommittee of the House Committee on Labor, 74th Cong., 2nd Sess., on H. R. 9072, *To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States*, pp. 15, 16, 22, 27, 52, 53, 60, 62, 89, 90, 92, 93, 138, 139, 141, 143, 146, 149, 150, 154, 155, 162, 219-225, 232-236, 243, 248, 250, 293, 294, 310-311, 336, 536-539, 601, 611-612, 784-785; Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor,

cient to note that Congress enacted the Fair Labor Standards Act with full recognition of the fact, self-evident in any event, that maintenance of adequate labor standards in industries which compete in interstate commerce could be accomplished only by federal action.

4. *The Lumber Industry.*—The Fair Labor Standards Act was enacted with a view to eliminating from interstate channels goods of whatever nature, when produced under substandard labor conditions. The legislature did not intend to differentiate between specific industries, nor does the constitutional problem vary according to the type of goods in question. But the lumber industry is peculiarly illustrative of conditions to which the Fair Labor Standards Act is directed. Especially since the appellee is a lumber producer, it seems appropriate to bring the situation in this industry to the Court's attention.⁴⁶

Lumber is produced in every state but North Dakota, and shipped in interstate commerce from every state but three.⁴⁷ Over fifty-seven percent

75th Cong., 1st Sess., on S. 2475 and H. R. 7200, *the Fair Labor Standards Act of 1937*, pp. 93-95, 111, 127, 134, 140, 160, 175, 183, 187, 193, 200, 245, 250, 309-316, 397-398, 402, 403-407, 413-414, 455; see also notes 12-16, 20-31, 39, pp. 23-25, 28-29, 31.

⁴⁶ In a strict sense, since appellee can raise no constitutional questions but his own, it could be argued that he can attack the Act only as it applies to the lumber industry. See p. 115, note 19, *infra*.

⁴⁷ The material in this paragraph is taken from United States Department of Agriculture, Forest Service, *Lumber Distribution and Consumption for 1936*, compiled by R. V.

of the lumber produced enters into interstate or foreign commerce. The extent of the interstate movement appears from the fact that the leading western producing states, Washington and Oregon, ship lumber to each of the forty-seven other states; Alabama, in the southern producing area, ships to thirty-six other states, and Georgia to twenty-eight. The interstate character of the competition in the lumber markets is shown by the number of producing states from which each state obtains the lumber it consumes. New York receives lumber from thirty-eight other states, Ohio from thirty-six, Illinois from thirty-four. Even the producing states receive substantial quantities of lumber from without their borders, Georgia, for example, receiving over seventeen percent of the lumber it consumes from seventeen other states. The appellee's own operations are shown by the indictment to extend as far afield as New York, Ohio, South Carolina, and Florida (R. 11-14).

The advantage which accrues to the wage cutter in this industry was brought to the attention of Congress during the debates on the Fair Labor Standards Act. A letter from an Alabama lumber operator stated that (81 Cong. Rec. 7648):

There is prevailing in the lumber industry in the South today a variance in wages of common labor in saw mills and the lumber

Reynolds and A. H. Pierson (1938), Table 5, pp. 19-24, which sets forth the amount of lumber shipped from each state to each other state in 1936.

industry of 10 cents per hour to 27½ cents per hour and weekly hours of 40 to 60 per week.

This difference in wages and hours makes a very unfair competition between producers and has a tendency to lower wages and increase hours per week. It makes hard competition for the mill that wants to shorten hours and pay good wages.

Studies of the Bureau of Labor Statistics show that in 1932 the average wage in Georgia saw-mills was 13.4¢ per hour and the average earnings per week \$5.67.⁴⁸ The average wage for laborers was even lower, being 9.4¢ per hour and \$3.76 per week, respectively, and many, of course, received less than the average.⁴⁹ The average annual wage for all employees in the lumber industry in Georgia in 1937 was \$388.91, lower than in any other state.⁵⁰ The competitive significance of these low wages is indicated by the fact that the average mill price of yellow pine in Georgia in 1937 was considerably below that of any other state.⁵¹

We submit that this brief survey demonstrates that conditions in the lumber industry are precisely those which the Fair Labor Standards Act was

⁴⁸ United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 586, p. 6.

⁴⁹ *Id.*, at p. 32, 38.

⁵⁰ Computed from United States Bureau of the Census, *Census of Manufactures, 1937: Lumber and Timber Products*, Table 2. This figure does not indicate what proportion of the year the employee worked in the industry.

⁵¹ *Id.*, Table 8.

designed to correct. The low wages and long hours spread throughout the national market by use of the channels of interstate commerce have resulted in labor standards far below the minimum necessary for subsistence.

5. *The Legislative Findings.*—The elaborate investigation conducted by Congress may well have been unnecessary, for its results were a matter of common knowledge. As was said in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 399, "It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land." This Court has already taken judicial notice, without the presentation of any factual brief, of the familiar economic conditions upon which the Fair Labor Standards Act is based. See *Thornhill v. Alabama*, 310 U. S. 88; *Apex Hosiery Co. v. Leader*, October Term, 1939, No. 638; *Whitfield v. Ohio*, 297 U. S. 431, 439. In the *Thornhill* case the Court said (p. 103):

It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect wide

spread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. * * *

In *Whitfield v. Ohio*, *supra*, p. 439, the Court noted with respect to an analogous problem that "free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor."

Nevertheless, it was upon the foundation of its own investigations that Congress based the findings of fact set forth in the committee report and in Section 2 of the Fair Labor Standards Act.

The House committee report, No. 2182, 75th Cong., 3d Sess., p. 7, succinctly summarizes the facts upon which the legislation rests:

Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony at the joint hearings held on H. R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce

have been open to goods produced under substandard labor conditions; (2) that the overwhelming majority of reputable employers consider competition in wages as an unfair and unconscionable method of competition in commerce; (3) that the maintenance of substandard labor conditions by the few employers referred to results in a downward spiral of wages in the industry with consequent dissatisfaction among employees in the industry which in turn results in labor disputes in the industry; and (4) that the States are unable to remedy the situation because goods which were produced under substandard labor conditions in one State may, protected by the failure of Congress to exercise its commerce power, flow freely into another State which attempts to maintain fair labor standards.

The judgment of its committee was accepted by Congress, and the quoted conclusion was substantially repeated in Section 2 of the Act, *infra*, p. 119. Indeed, the debates on the floor showed general agreement among members of Congress, whether supporting or opposing the legislation, as to the competitive importance of labor standards.²²

²² See 81 Cong. Rec. 7648-7649, 7667, 7668, 7722, 7780, 7848, 7868; 82 Cong. Rec. 1390, 1395, 1397, 1402, 1406, 1467-1468, 1478, 1478-1479, 1497-1498, 1510, 1601, 1671, 1672-1673, 1807; 83 Cong. Rec. 7284, 7285, 7290, 7291, 7298, 7299, 7312, 7316, 7317, 7324, 7418, 7435. Congressional debates may be resorted to "in determining * * * what were the evils sought to be remedied" (*Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 650), and "as a means of ascertain-

In the court below appellee objected to the consideration of these findings. But they serve here only to corroborate what would be known or presumed to the Court without them. *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153.

The wealth of economic material and facts of common knowledge makes it unnecessary to rely on the legislative findings. Nonetheless they are entitled to and should be given the greatest weight. *Stafford v. Wallace*, 258 U. S. 495, 521; *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 37."

6. *The Legal Limitations*.—We have sketched the economic incapacity of the states to remedy long hours and low wages in interstate industry. This incapacity rests in part upon the commerce clause itself.

ing the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted" (*Standard Oil Co. v. United States*, 221 U. S. 1, 50). See, also, *Humphrey's Executor v. United States*, 295 U. S. 602, 625; *United States v. San Francisco*, 310 U. S. 16, 22.

"Appellee's contention below was that the principle, that great weight was to be given the legislative findings, applied only to questions of due process and not to the question of whether "particular circumstances have a direct or indirect effect upon interstate commerce." But it was with respect to that precise point that the statement in the *Stafford* and *Olsen* cases was made that:

"This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

Because of the commerce clause the states cannot, in the absence of congressional authorization, prohibit the importation of goods produced under conditions forbidden to home industries. *Leisy v. Hardin*, 135 U. S. 100; *Baldwin v. Seelig*, 294 U. S. 511. It is unnecessary to labor the point that, since the commerce clause is in terms simply an affirmative grant of authority to Congress, it can only deprive the states of power over a subject if it places the power thus stripped from the states in the federal government.

Even if a state could protect itself against the introduction of goods produced under substandard conditions in other states, it could not thereby safeguard its industries against the loss of their markets in the forty-seven other states of the Union. This national market is, of course, vital to the commerce and industry of each state, which have been developed on a nation-wide scale as a result of the prohibition which the commerce clause imposed upon the power of each state to exclude the products of other states from their local markets.

It is, then, plain enough that the interstate labor problem cannot be solved by state action. Interstate competition, expanded for a century and a half under the commerce clause, makes efforts by the states themselves to improve wages and hours in industries with interstate markets wholly futile as a matter both of economic fact and of constitutional law. This has been seen to be the conclu-

sion whether one proceeds from facts of common knowledge, from the legislative findings, from the Congressional investigations, or from the economic studies of labor conditions.

B. THE COMMERCE CLAUSE WAS DESIGNED TO GIVE CONGRESS POWER TO REGULATE COMMERCIAL MATTERS OF NATIONAL CONCERN WHICH ARE BEYOND THE COMPETENCE OF THE INDIVIDUAL STATES

Only the national government, as we have shown, can undertake to deal with the evil of substandard wages or hours of employment in an industry which produces for an interstate market. The commerce clause was designed to empower Congress to deal with just such problems.

1. *The Federal Convention.*¹—The Constitutional Convention met chiefly because the Articles of Confederation gave the federal government no power to regulate commerce.² The Virginia dele-

¹ The content of this subsection is developed in Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335.

² The states possessing seaports availed themselves of their good fortune to impose duties on imports, a good part of which consumers in other states had to pay. Several efforts to give Congress power over commerce failed to secure the unanimous vote necessary under the Articles of Confederation. The attempted Annapolis convention, which met to consider the problem of "commercial regulations", led to the calling of the federal convention at Philadelphia. See 1 Elliot, *Debates on the Federal Constitution* (2d. ed. 1836), 92, 106-119; 1 Bancroft, *History of the Formation of the Constitution of the United States* (1882), 250; Warren, *The Making of the Constitution* (1928), 85.

gation had prepared a series of resolutions as a basis for discussion.³ The sixth of these resolutions, proposed by Governor Randolph four days after the Convention assembled, read in part as follows: ⁴

that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; * * *

The broad standard thus proposed for the division of power between state and nation was approved by the Convention on May 31st by a vote of nine states in favor, none against, one divided.⁵ The New Jersey plan, proposed by Paterson shortly afterwards, included in a short enumeration of federal powers the provision that Congress could "pass Acts for the regulation of trade & commerce as well with foreign nations as with each other".⁶ The New Jersey plan was rejected and the Virginia plan reapproved, on June 19th, by a vote of seven states to three; one being divided.⁷

³ Madison's *Debates*, as reported in H. Doc. No. 398, 69th Cong., 1st Sess. (1927), entitled "*Documents Illustrative of Formation of the Union of the American States*", 114.

⁴ *Id.*, at 117.

⁵ *Id.*, at 129, 130.

⁶ *Id.*, at 205.

⁷ *Id.*, at 234.

On July 17th, when Randolph's resolution on the division of powers again came up for debate, an amendment which might have limited the broad standard proposed by Randolph, was defeated.⁹ Instead, a motion by Bedford of Delaware to extend its scope was adopted, and the resolution as amended approved by a vote of eight to two.⁹ The resolution then read, in terms considerably broader than even the Randolph proposal, as follows:¹⁰

VI. Resolved, That the national legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

With the other resolutions approved by the Convention, this resolution was then sent to the "Committee of detail * * * to * * * report the Con-

⁹ It was proposed by Sherman of Connecticut, who alone had opposed the resolution originally, and read (*id.*, at 388): "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the general welfare of the U. States is not concerned."

¹⁰ *Id.*, at 389-390.

¹¹ *Id.*, at 389, 466. The additional power to legislate "in all cases for the general interests of the Union" seemed even to Randolph to be "a formidable idea indeed." *Id.*, at 389.

stitution."¹¹ This committee made its report on August 6th, ten days later. As it was expected to do, it had changed the indefinite language of Resolution VI into an enumeration of the powers of Congress closely resembling Article I, Section 8 of the Constitution as it was finally adopted.¹² The commerce clause, which was passed unanimously and without debate read: "The Legislature of the United States shall have the power * * * To regulate commerce with foreign nations, and among the several States".¹³

Significantly, no member of the Convention at any time challenged or discussed the change made by the committee in the form of the provision for the division of powers between state and nation. This is susceptible of only one reasonable explanation—that the Convention believed that the enumeration conformed to the standard previously approved, and that the powers enumerated comprehended those matters as to which the states were separately incompetent and in which national legislation was essential.¹⁴

¹¹ *Id.*, at 465.

¹² *Id.*, at 475. In the discussion of the Sixth Resolution, Mr. "Ghorum" (presumably Nathaniel Gorham, of Massachusetts) had stated (p. 384): "We are now establishing general principles, to be extended hereafter, into details which will be precise & explicit."

¹³ *Id.*, at p. 475.

¹⁴ In *Carter v. Carter Coal Company*, 298 U. S. 238, 291-292, the majority opinion states that the change from the general resolution to the specific enumeration of powers

The commerce clause was the only one of the enumerated powers in which Congress was given any broad power to regulate trade or business, the primary occasion for the new constitution. The Convention must, therefore, have understood that by this clause it was granting to Congress all the power over trade or business which the national government would need to provide for situations which the states separately would be unable to meet.

It was the clear understanding of the state conventions called to consider the ratification of the Constitution that the division of power gave to the national government control of all matters of national, as contrasted with local, concern. On this point both the proponents and opponents of ratification agreed. Hamilton, in the New York Convention, urged¹⁸ that:

The powers of the new government are general, and calculated to embrace the aggre-

shows that the Convention had abandoned the principles set forth in the resolution; it does not refer to the three votes of the Convention adopting or approving the Randolph resolution, or to the absence of any adverse vote, or to the expressed understanding of the delegates that the general principles of the Resolution were to be "extended" into a list of details. Instead, the opinion states that the Convention "declined to confer upon Congress" these powers. The history of the proceedings in the Convention demonstrates that this incomplete narration leaves a wholly incorrect impression.

¹⁸ Elliot's *Debates*, II, 265. Other delegates to the New York Convention expressed the same thought. Chancellor

gate interests of the Union, and the general interest of each state, so far as it stands in relation to the whole. The object of the state governments is to provide for their internal interests, as unconnected with the United States, and as composed of minute parts or districts * * *

And in the Virginia Convention, James Monroe, opposing ratification, drew the same contrast between matters of national and those of local concern.¹⁶

There is, of course, no thought that in 1787 the framers and ratifiers of the Constitution had in contemplation either the close-knit economic structure which exists today, or the need for a system of national control coextensive with that structure. When they considered the need for regulating "commerce with foreign nations and among the several states," they were thinking in terms of the national control of trade with the European countries and the removal of barriers obstructing the movements of goods across state lines.¹⁷ For in 1787 there was no need for national regulation of

Livingston declared: "The truth is, the states, and the United States, have distinct objects. They are both supreme. As to national objects, the latter is supreme; as to internal and domestic objects, the former." *Id.*, II, 385. Melancthon Smith, opposing ratification, states: "The *state governments* are necessary for certain local purposes; the *general government for national purposes*." *Id.*, II, 332.

¹⁶ *Id.*, III, 214.

¹⁷ Hamilton and Madison, *The Federalist*, Nos. VII, IX, XLII; Elliot's *Debates*, III, 260.

the internal trade or business of the new country. But the framers of the Constitution did not use language which would restrict the federal power to the methods of regulation immediately necessary. They were acutely conscious that they were preparing an instrument for the ages, not a document adapted only for the exigencies of the time."

We do not suggest that the men who met in Philadelphia intended to give Congress, *in addition to* the enumerated powers, authority "to legislate in all cases for the general interests of the union," or "in those to which the states are separately incompetent". On the contrary the enumerated powers themselves constitute a list of such "cases", described in the general and flexible language found throughout the Constitution. We urge only that the powers enumerated should be construed in the spirit in which they were written, so that the goal

"* * * we must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity * * *. Nothing therefore can be more fallacious, than to infer the extent of any power proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a *Capacity* to provide for future contingencies, as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity." Hamilton, *The Federalist*, No. XXXIV, p. 147. See also Warren, *The Making of the Constitution*, at 82, in which he quotes from James Wilson and John Rutledge, members of the Convention.

Compare Marshall's statement that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *McCulloch v. Maryland*, 4 Wheat. 316, 415.

of those who framed the Constitution to accomplish those broad aims might be achieved.

2. *The Words of the Constitution.*—The purpose of the men who drew the Constitution thus seems reasonably clear: The Congress was to control all commercial matters of national concern, beyond the competence of the individual states to regulate. It has been suggested,¹⁹ however, that they abandoned or defeated that purpose because they gave to the Congress only the power "to regulate Commerce * * * among the several States". But these under any usage are the broadest of terms. And when the term is read against the etymology of 1787 the breadth of its connotations becomes even clearer.²⁰

Often, of course, "commerce" was used in the narrowest sense of buying, selling, and exchanging.²¹ But the term also had a heavier load to carry. "Business" and "industry" were just beginning to acquire a secondary meaning quite different from the simplicity of their literal content,²²

¹⁹ *Carter v. Carter Coal Co.*, 298 U. S. 238, 291-292; see footnote 14, *supra*, p 46.

²⁰ The material in these paragraphs is derived, in the main, from Walton H. Hamilton and Douglass Adair, *The Power to Govern*.

²¹ The dictionary definitions of this nature are collected in *The Power to Govern*, pp. 55-57, 206-207.

²² *Id.*, pp. 49-53. Even today, "habitual diligence" is a primary definition of "industry", and the dictionary retains "the quality or state of being busy" as the first definition of "business", qualified by the epithet "obsolete". *Webster's New International Dictionary* (1939 ed.)

and the concepts now covered by those terms were often included within the scope of "commerce." In 1790 an author undertook to write a history of "commerce" because there was no satisfactory account of the "improvements in navigation, colonization, manufactures, agriculture, and their relative arts and branches."²³ Indeed, at the Convention itself, Pinckney referred to "Commercial men" as an inclusive contrast to "Professional men" and "the landed interest."²⁴ An economist's pamphlet, read at Franklin's home to some of the delegates to the Convention, stated that the "commerce of America, including our exports, imports, shipping, manufactures, and fisheries may be properly considered as forming one interest."²⁵ "Commerce," in short, was frequently used to refer to the entire moneyed economy—to the processes by which men obtained money, whether by the

²³ Adam Anderson, *An Historical and Chronological Deduction of the Origin of Commerce* (Dublin, 1790); Vol. I, p. v.

²⁴ June 25th; Madison's *Debates*, pp. 271-272. At another time he seems to have spoken in a narrower sense of the "promotion of agriculture, commerce, trades and manufactures". August 18th, *Id.*, p. 564.

²⁵ Collected with other papers and published as *A View of the United States of America * * * between the years 1787 and 1794 * * * the whole tending to exhibit the progress and present state of civil and religious liberty, population, agriculture, exports, imports, fisheries, navigation, ship-building, manufactures, and general improvement*. London, 1795. First published in Philadelphia, 1794, p. 7. See *The Power to Govern*, pp. 169-170, 239.

production or manufacture of goods for sale, or by the exchange of goods produced by others. Even today we can hear echoes of the eighteenth century speech. The phrases "commercial geography," "commercialize," and "commercial law" each speaks with overtones which embrace the whole industrial and financial economy.

Congress was not, of course, given the power to regulate "commerce," but only "commerce among the several States." The meaning of "among" has not changed since 1787. The dictionaries of that time²² and of today²³ support Marshall's familiar definition. "The word 'among,'" he declared "means intermingled with. A thing which is among others, is intermingled with them."²⁴ "Intermingled with" is not an invariable synonym for "among," but its use by Marshall shows that the commerce clause carries with it the concept of interrelationship rather than merely that of movement across state lines.²⁵

²² *Samuel Johnson's Dictionary* (6th ed. 1785); *Perry's Royal Standard English Dictionary* (4th Am. ed. 1796); *Alexander's Columbian Dictionary* (1800); *Webster's Dictionary* (1st ed. 1806); *Webster's Dictionary* (1841 ed.).

²³ *Webster's Dictionary* (1931 ed.); *Funk & Wagnall's Standard Dictionary* (1928 ed.).

²⁴ *Gibbons v. Ogden*, 9 Wheat. 1, 194.

²⁵ Modern dictionaries express the same conception. The *Standard Dictionary* (1928 ed.) gives as one of the meanings of "among": "Affecting all or a number more than one, so as to be commonly shared by."

"Commerce among the several States," even if the standards are those of etymology alone, therefore carries a meaning far broader than that recognized by the decision below. To the eighteenth century reader it carried no implication that an integrated economic process was to be truncated and a part only given to the control of Congress. To recapture its full meaning today it would be necessary to abandon the felicity of the succinct phrase and to substitute a more labored expression, such as "the interrelated business transactions of the several states."³⁰

The men who met in Philadelphia in 1787 could not anticipate the etymology of the twentieth century. But they did realize that the Constitution must apply in a "remote futurity," bringing "con-
 gencies * * * illimitable in their nature."³¹ They therefore set out in the preamble the great purposes which they sought to attain, and which they had directed the Committee on Detail to translate into the enumerated powers. The draftsmen of the Constitution were not given to literary flourishes for their own sake; and the preamble demonstrates that the Convention understood that the Constitution would serve and should be construed to "promote the general welfare" and not

³⁰ Compare Cerwin, *Congress's Power to Prohibit Commerce, a Crucial Constitutional Issue* (1933), 18 *Corn. L. Q.* 7, 502.

³¹ Alexander Hamilton, *supra*, note 18, p. 49.

to perpetuate a union of states powerless where power is needed.³²

3. *Judicial Recognition*.—The Court, however, does not today face its constitutional questions with only the document and an eighteenth century lexicon. Judicial decision, legislative practice, and the sheer weight of history have added a gloss to the words and a shape to the federation which perhaps could not have been foretold in 1787.

Yet the broad powers over commerce granted to Congress by the Constitution have been retained substantially unimpaired. The decisions of this Court, from their very beginning, have recognized that the commerce clause gives Congress power to meet the economic problems of the nation, whatever they may be. In *Gibbons v. Ogden*, 9 Wheat. 1, the first and the most authoritative decision under the commerce clause, Chief Justice Marshall, himself a member of the Virginia Ratifying Convention, laid down the basic principles. In his opinion he said: ³³

Comprehensive as the word "among" is, it may very properly be restricted to *that commerce which concerns more states than one* * * *. The enumeration of the particular classes of commerce to which the power was to be extended * * * presupposes something not enumerated; and that something, if we regard the language or

³² See Story, *Commentaries on the Constitution* (4th ed. 1873), sec. 459 *et seq.*, for recognition of the importance of the Preamble as a guide to construing the Constitution.

³³ 9 Wheat. at 194-195.

the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the states generally*; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. [Italics supplied.]

During the years which have intervened since that basic pronouncement, the Court has again and again reaffirmed, in quotation and paraphrase, the doctrine that the commerce power extends to "that commerce which concerns more states than one," and "to those internal concerns which affect the states generally". The quoted passage from *Gibbons v. Ogden* was repeated or restated in *Mayor of New York v. Miln*, 11 Pet. 102, 146, in 1837; in *The Daniel Ball*, 10 Wall. 557, 564, in 1870; in *Kidd v. Pearson*, 128 U. S. 1, 17, in 1888; in *Champion v. Ames*, 188 U. S. 321, 346, in 1903; in *The Employers' Liability Cases*, 207 U. S. 463, 493, 507, in 1908; and in the *Minnesota Rate Cases*, 230 U. S. 352, 398, in 1913.

Although "differences have arisen in" the application of these principles "to the complicated affairs" of the nation, they have "never [been] doubted, and universally approved" (*Employers'*

Liability Cases, *supra*, Mr. Justice Moody dissenting, at 507.³⁴ In one of the first of the leading cases of the modern era, the Court, speaking through the present Chief Justice, reaffirmed its adherence to the fundamental doctrine (*Minnesota Rate Cases*, 230 U. S. 352, 398):

The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.

The Court in several cases has departed from the broad interpretation which the framers intended, but the reasoning of those cases stands substantially repudiated.³⁵ Apart from these cases, the

³⁴ We cannot forbear calling to the attention of the Court this dissenting opinion, which so well explains the vision of the framers and the constitutional philosophy which is epitomized in the commerce clause. See 207 U. S., at 519-522.

³⁵ Compare *United States v. E. C. Knight Co.*, 156 U. S. 1, with *Standard Oil Co. v. United States*, 221 U. S. 1, 68, and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39; *Hopkins v. United States*, 171 U. S. 578, and *Anderson v. United States*, 171 U. S. 604, with *Stafford v. Wallace*, 258 U. S. 495, and *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420; *Adair v. United States*, 208 U. S. 161, with *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*, and *Texas Electric Railway Co. v. Eastus*, 308 U. S. 637; *Hammer v. Dagenhart*, 247 U. S. 251, with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*, and *Mulford v. Smith*, 307 U. S. 38; *Carter v. Carter*

Court from the beginning has given effect to the living principle that Congress may regulate "the commerce which concerns more States than one."

This Court has recognized that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift and Company v. United States*, 196 U. S. 375, 398; cf. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41. In *Stafford v. Wallace*, 258 U. S. 495, 519, and *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 35, the Court adverted to "the great changes and development in the business of this vast country", and declined to defeat the underlying purpose of the commerce clause to protect and control the stream of interstate commerce "by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." The *Swift* case, this Court declared in *Chicago Board of Trade v. Olsen*, *supra*, "merely fitted the commerce clause to the real and practical essence of modern business growth".²²

Coal Co., 298 U. S. 238, with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*, and *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453.

²² A word on the quite different problems of the Canadian and Australian federations may be appropriate.

In Canada, Dominion acts of 1935 regulating wages and hours were held *ultra vires* in *Atty.-Gen. for Canada v.*

The growth of the field in which the commerce power may be exercised is a direct and inevitable consequence of the integration of the national economic structure. In the eighteenth and early nineteenth centuries the business of a manufacturer was usually a local enterprise and of little national concern; today it plainly is not. The commerce clause itself has erased state lines for purposes of commerce, and has been largely responsible for the expansion of commerce into national rather than local markets. As the markets of the manufacturers expanded beyond state lines, the technical processes of production acquired a broader commercial significance. The apprentice to a New

Atty.-Gen. for Ontario, [1937], A. C. 326. The British North America Act, 1867, confers upon the provinces "exclusive" power over certain subjects, including "Property and Civil Rights," and upon the Dominion, notwithstanding, "exclusive" authority over other subjects, including "The regulation of Trade and Commerce." §§ 91, 92. It was thus necessary to classify the enactments within one "exclusive" category or the other. See *Huddart Parker, Ltd. v. The Commonwealth* [1931], 44 C. L. R. 492, 526-527; W. Ivor Jennings, *Constitutional Interpretation—The Experience of Canada*, 51 Harv. L. Rev. 1. No comparable issue arises under our Constitution.

In Australia the wage-and-hour problem has not been treated under the commerce clause (subhead 1 of Section 51) of the Commonwealth of Australia Constitution Act, 1900, but under subhead 35, providing for conciliation and arbitration of industrial disputes. The cases thus have no bearing here. See, e. g., *Australian Boot Trade Federation v. Whybrow & Co.*, 11 C. L. R. 311, 318, 345-346; *Waterside Workers Federation v. Comm. Steamship Owners Assoc.*, 28 C. L. R. 209; *Metal Trades Employers' Assoc. v. Amalgamated Engineering Union*, 36 C. A. R. 534.

York cordwainer in 1800 would have only a disinterested curiosity in the wages paid the Baltimore apprentice. Today the worker in a Massachusetts shoe factory knows that his earnings reflect the wage scales in New York, Georgia, Maine, and Missouri. If the result is that the field of possible congressional regulation under the commerce clause is enlarged, the cause is not a change in what the Constitution means, but a recognition of the vast expansion in the number and importance of those intrastate transactions which are now economically inseparable from interstate commerce—of the unification along national lines of our economic system.

In the sections of this brief which follow we shall deal with the specific sections of the Act which are here challenged; each will be seen to be well within the commerce powers of Congress as granted by the Constitution and as construed by this Court.

**C. SECTION 15 (A) (1) IS A VALID EXERCISE OF THE
COMMERCE POWERS OF CONGRESS**

The Fair Labor Standards Act was enacted in order to meet the serious problems, which we have outlined above (*supra*, pp. 20-43), arising from the use of the channels of interstate commerce by goods produced under substandard labor conditions. The Act attacks these evils in two ways. It prohibits the interstate transportation of goods produced under such conditions, and it forbids the employment in interstate commerce or in the pro-

duction of goods for interstate commerce of employees working below the minimum standards established. These provisions, although separable in operation, are interrelated in purpose. Each will have the effect of lessening the extent of the evil in the state of origin, and each will protect other states which produce goods in competition with the state of origin from harm to their own labor standards as a competitive consequence of the more oppressive conditions.

We shall discuss first Section 15 (a) (1), which forbids the interstate shipment of goods produced under substandard labor conditions.¹ It declares that "it shall be unlawful for any person—

to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 * * *

¹ Counts 13 to 19 of the indictment are based upon this provision. Counts 17 to 19 charge shipment in interstate commerce by defendant of goods which he produced in violation of the statutory standards. Counts 13 to 16 charge shipment by defendant in interstate commerce of goods which were produced by another, with the knowledge of the defendant, in violation of the Act.

² "Commerce" is defined in Section 3 (b) as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Section 16 (a) provides penalties for violation of Section 15.

1. *Prohibition of Interstate Shipment is a Regulation of Commerce.*—The sales, shipments, and deliveries prohibited by Section 15 (a) (1) are in themselves interstate commerce. A prohibition of interstate shipment except in compliance with prescribed conditions is on its face a regulation of interstate commerce. This Court has often so ruled. *Mulford v. Smith*, 307 U. S. 38; *Currin v. Wallace*, 306 U. S. 1, 11-12; *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 442; *Champion v. Ames*, 188 U. S. 321; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 415; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334, 347.

Since Section 15 (a) (1) regulates interstate commerce, it would seem obvious that it falls within the commerce powers granted to Congress by Section 8 of Article I of the Constitution. Various arguments have been advanced, however, in support of the proposition that the commerce clause should not be construed to mean what it so plainly says. We shall discuss each of these points in turn.

2. *Harmless Commodities.*—It can no longer be contended that the power of Congress to restrict or condition interstate commerce is limited to articles in themselves harmful or deleterious. The Constitution, of course, contains no such limitation; it rests rather upon certain language in *Hammer v. Dagenhart*. But so narrow a reading of the

commerce clause has since been abandoned. *Brooks v. United States*, 267 U. S. 432; *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419; *Mulford v. Smith*, 307 U. S. 38; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334. The *Kentucky Whip & Collar* case, which upheld the validity of the Ashurst-Sumners Act as to prison-made goods generally is conclusive. It is manifest that the detrimental effects upon interstate commerce of prison labor are of the same kind as those of adult labor paid wages below the subsistence level. If Congress may take steps to close the channels of interstate commerce to the one, it can take similar action with respect to the other.

3. *The purpose of the prohibition against interstate shipments.*—The suggestion has been advanced that Congress may not exercise its commerce power, even over interstate commerce itself, for ends, however praiseworthy, which do not concern commerce, narrowly defined to mean merely transactions of exchange or transportation.

Since the Fair Labor Standards Act was intended to regulate interstate competition, to avoid the spread of harmful conditions by reason of use of the channels of interstate commerce, and to prevent labor disputes (see *supra*, pp. 39-40), we think it clear that the purpose of Congress in enacting the legislation was commercial in the strictest sense.

Even, however, if the Act were concerned simply with humanitarian ends it could not for that reason be held outside the scope of the enumerated powers. This Court has repeatedly proclaimed that the power of Congress to regulate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196; *Kentucky Whip & Collar v. Illinois Central R. Co.*, 299 U. S. 334, 345; *United States v. Carolene Products Co.*, 304 U. S. 144, 147; *Curran v. Wallace*, 306 U. S. 1, 13-14. The paradoxical nature of the suggestion that a constitution adopted "in Order to * * * promote the general Welfare" might be violated because it achieved that very result needs no extended comment.

Such a construction of the commerce clause was repudiated in the first case arising under it. *United States v. The Brigantine William*, 28 Fed. Cas. No. 16700. (1808). Mr. Justice Story, in his *Commentaries* also expressly rejected the view that the clause permitted only advancement of the interests of commerce.³

³ Judge Davis, a member of the Massachusetts convention, declared (p. 621) that the power over commerce was not limited to its advancement but included the power to abridge it "in favour of the great principles of humanity and justice." The case is discussed in Warren, *The Supreme Court in United States History*, Vol. I, pp. 341-350.

⁴ *Commentaries on the Constitution*, Secs. 1079-1089. In Section 1089 Story said: "Now, the motive of the grant of

This Court in repeated instances has sustained the exercise of the federal power over interstate commerce to accomplish objectives the promotion of which is not expressly conferred on Congress by the Constitution and which were appropriate objects of state legislation. Thus, the commerce power may be used with the objective of suppressing lotteries, *Champion v. Ames*, 188 U. S. 321. Or the purpose may be to promote health, *Hipolite Egg Co. v. United States*, 220 U. S. 45; to promote morality, *Hoke v. United States*, 227 U. S. 308; or to prevent theft of property or persons, *Brooks v. United States*, 267 U. S. 432; *Gooch v. United States*, 297 U. S. 124. In each of these cases the statutes were sustained because, irrespective of their various objectives, it was interstate commerce that was regulated.

"The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 569. Cf. *Gibbons v. Ogden*, 9 Wheat. 1, 197, 227. Congress possesses, therefore, the same unlimited authority as do the

the power is not even alluded to in the Constitution. It is not even stated that Congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. * * *. The motive to the exercise of a power can never form a constitutional objection to the exercise of the power."

states within their field to exercise "the police power, for the benefit of the public, within the field of interstate commerce." *Brooks v. United States*, *supra*, at 436-437; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, *supra*; *United States v. Carolene Products Co.*, *supra*; *Curran v. Wallace*, *supra*.

4. *Section 15 (a) (1) does not regulate production.*—The contention that Section 15 (a) (1), which in terms prohibits only interstate shipments and sales, regulates production rather than commerce, plainly cannot be supported. A similar argument was made in *Mulford v. Smith*, 307 U. S. 38, where it was contended that the regulation of the amount of tobacco marketed in commerce was in fact a regulation of the production of tobacco because of an alleged intent to control, and a direct effect upon, the amount of tobacco which could be produced. The *Mulford* case is squarely in point here.

There the Court declared (307 U. S., at 47-48):

The statute does not purport to control production * * * Any rule, such that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute

prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation. [Italics added.]

Plainly the effect of a ban upon the interstate shipment of goods produced under substandard labor conditions has no greater effect upon intrastate production than did the prohibition involved in the *Mulford* case, and the power of Congress cannot reach to the one and fall short of the other.

The substance of the opposing argument is that any regulation of commerce which has a necessary effect upon matters outside the sphere of federal control is invalid. If the test of constitutionality were the existence of such collateral effects many unquestionably valid laws would fall. Distribution or marketing, transportation, and production are so interrelated that regulation of any one of them may, and often inevitably will, affect the others.*

*As illustrative of the proposition that collateral effects do not determine constitutionality, it is sufficient to mention, in addition to the provisions of the Agricultural Adjustment Act sustained in *Mulford v. Smith*, the protective tariff, which directly affects the amount of domestic goods manufactured; the Lottery Act, which directly discourages lotteries; the Federal Kidnaping Act, which discourages kidnaping; and the Connally Hot Oil Act, which, through its restriction upon the shipment of oil in interstate commerce, inevitably affects the amount produced.

Compare the unquestioned validity of sumptuary taxes which are designed to discourage the activity taxed. See

In his dissenting opinion in *Hammer v. Dagenhart*, 247 U. S. 251, 277, Mr. Justice Holmes pointed out that many cases demonstrate that federal statutes are not rendered invalid because of their "deterrent" or "regulatory" effect upon matters not subject to congressional power—that "if an act is within the powers specifically conferred upon Congress, * * * it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, * * *."

5. *Hammer v. Dagenhart*.—Appellee relies largely on the authority of *Hammer v. Dagenhart*, 247 U. S. 251, which held unconstitutional a statute (39 Stat. 675) prohibiting the interstate transportation of child-made goods. That statute might be distinguished from the present Act on the ground that Congress has here made specific findings, based upon facts of common knowledge, as to the existence of a relationship between the stat-

particularly *Veazie Bank v. Fenno*, 8 Wall. 533, 543; *McCray v. United States*, 195 U. S. 27, 60; *Sonzinsky v. United States*, 300 U. S. 506. Cf. *Magnano v. Hamilton*, 292 U. S. 40.

"The majority of the Court (and *a fortiori* the minority) recognized in *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 371, in treating an argument similar to that made by appellee here, that:

"The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional."

utory prohibition and interstate commerce. Cf. *Hill v. Wallace*, 259 U. S. 44, and *Chicago Board of Trade v. Olsen*, 262 U. S. 1. And the economic integration of the nation in the past two decades has made even less tenable the basic postulate of self-sufficient states which underlay that decision. Apart, however, from the force to be given to these considerations, we recognize that the statute declared unconstitutional in *Hammer v. Dagenhart* is identical with the child-labor provisions in the present Act. And the prohibition against transporting goods produced by adults working under substandard labor conditions which is involved in this case cannot be distinguished in theory from the ban upon shipping goods produced by children.

The Child Labor Act in terms applied only to the transportation of goods across state lines; it thus regulated interstate commerce itself, and nothing else. But the majority of the Court viewed the Act as a mere regulation of labor in the states. Four Justices of this Court thought at the time that the statute was a regulation of interstate commerce within the meaning of the Constitution. We believe that they were correct, and that their views have been given effect by the Court in subsequent decisions. *Brooks v. United States*, 267 U. S. 432; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334; *Mulford v. Smith*, 307 U. S. 38; cf. *National Labor Relations Board v.*

Jones & Laughlin Steel Corp., 301 U. S. 1. In particular, the decision in *Hammer v. Dagenhart* is squarely inconsistent with *Mulford v. Smith*, *supra*, which upheld a prohibition of interstate commerce having just as great an effect upon production as the Child Labor Act.

The effect of the decision in *Hammer v. Dagenhart* was to establish a limitation upon the commerce power which is contained nowhere in the Constitution, and which is contrary to the scope of that grant of power as defined in cases running from *Gibbons v. Ogden*, 9 Wheat. 1, to the most recent decisions. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, *supra*; *Mulford v. Smith*, *supra*. Since the states are precluded by the commerce clause itself from forbidding interstate shipments of goods produced under substandard labor conditions, the decision created a no man's land in which neither state nor nation could function. The establishment of such a hiatus in governmental power is plainly contrary both to the letter and spirit of the Constitution. Story, *Commentaries*, Sec. 1082; Mr. Justice Cardozo, dissenting in *Carter v. Carter Coal Co.*, 298 U. S. 238, 326; *Sunshine Anthracite Coal Co. v. Adkins*, October Term, 1939, No. 804.

It is submitted that the Court has abandoned the principles which controlled the decision in *Hammer v. Dagenhart*, and that the case should be expressly overruled.

D. SECTION 15 (A) (2) IS A VALID EXERCISE OF THE
COMMERCE POWER OF CONGRESS

Counts 1 to 11 of the indictment charge a violation of Section 15 (a) (2) of the Act. That section makes it unlawful for any person "to violate any of the provisions of section 6 or section 7". Section 6 required the payment of not less than twenty-five cents per hour and Section 7 the payment of not less than time and one-half for time in excess of forty-four hours per week¹ to each employee "who is engaged in commerce or in the production of goods for commerce".²

These provisions regulate the amount of wages paid and the hours worked by employees engaged in interstate commerce or in producing goods for that commerce.

¹ These became 30 cents and 42 hours after October 24, 1939, but the changes are immaterial here.

² Commerce is defined as interstate commerce. Sec. 3 (b); see footnote 2, *supra*, p. 60. Section 3 (j) defines "produced" as meaning:

"* * * produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The Wage and Hour Division has stated in its Interpretative Bulletin No. 5 that "employees are engaged in the production of goods 'for commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce." (Paragraph 2.)

The customary analysis suggests that the question of the power of Congress to regulate these transactions is to be answered according as the wages and hours of employees producing the goods for interstate commerce have a "direct" or only an "indirect" effect upon that commerce. Standing alone, these terms do not carry much aid to the resolution of the issue. But the previous decisions of this Court have given the terms a precision which is more than ample for the needs of this case. Measured by the standards found in those decisions, it seems plain enough that the existence of substandard labor conditions in the production of goods for interstate commerce has a direct and substantial effect upon that commerce. This conclusion is dictated by any of several applicable analyses.

1. *The Section is an Appropriate Means by which to Keep the Interstate Channels Free of Goods Produced under Substandard Conditions.*—The object of the Fair Labor Standards Act is to prevent the use of the channels of interstate commerce by goods produced under substandard labor conditions. This is accomplished by the direct prohibition found in Section 15 (a) (1). If Congress has power to attain such an end (see pp. 59-69, *supra*), it also has the power to choose any means which it deems appropriate to its accomplishment. *McCulloch v. Maryland*, 4 Wheat. 316, 421. The prohibition against substandard labor conditions

in the production of goods for interstate commerce clearly is a reasonable and appropriate method of keeping goods produced under such conditions out of interstate commerce. Section 15 (a) (2) may thus be supported on the same ground as Section 15 (a) (1), since it is a provision reasonably designed to effectuate the prohibition against interstate shipments contained in the latter section.

The maxim that Congress may choose the means by which its powers are to be exercised has frequently found expression in statutes applicable to transactions not in themselves within any of the granted powers. Such regulations have been sustained for the reason that they were "essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." *Purity Extract and Tonic Company v. Lynch*, 226 U. S. 192, 201-202; *Ruppert v. Caffey*, 251 U. S. 264; *Everard's Breweries v. Day*, 265 U. S. 545, 560; *Otis v. Parker*, 187 U. S. 606, 609; *Westfall v. United States*, 274 U. S. 256, 259; *St. John v. New York*, 201 U. S. 633.

This doctrine has frequently been applied to statutes enacted under the commerce clause.* A

* The congeries of regulatory and supervisory powers exercised in the administration of the Revenue Acts afford more distant analogies. And prohibition of the sale and manufacture of liquor which is not intoxicating has been sustained where power to prohibit the sale of intoxicating liquor existed, because the legislative body felt that control of nonintoxicating liquor was essential to the effectiveness of the primary prohibition. *Ruppert v. Caffey*, 251 U. S.

familiar illustration is the regulation of intrastate transactions which are so commingled with interstate transactions that all must be regulated if the latter are to be effectively controlled. *Shreveport Case*, 234 U. S. 342; *Wisconsin R. R. Commission v. Chicago B. & Q. R. Co.*, 257 U. S. 563; *Curran v. Wallace*, 306 U. S. 1; *Mulford v. Smith*, 307 U. S. 38.

Closely in point are other statutes in which a prohibition of interstate shipments has been supplemented by the regulation of transactions occurring before transportation began. The Meat Inspection Act forbids the shipment in interstate commerce of meat not inspected and passed by the Department of Agriculture (34 Stat. 1260, U. S. C., Tit. 21, Sec. 78). But that Act also requires that establishments slaughtering and processing meat to be used in interstate or foreign commerce permit federal inspection and appropriate disposition of all animals before slaughter.* These steps take place during the "production" of meat as food. Their utility and value as methods of keeping unwholesome meat out of interstate commerce are obvious, and their constitutionality has not been seriously questioned in thirty-four years.

264; *Everard's Breweries v. Day*, 265 U. S. 545, 560; *Purity Extract and Tonic Company v. Lynch*, *supra*.

* All animals showing symptoms of disease in the inspection are to be set apart, killed separately, and given a *post mortem* examination, and all carcasses found to be unfit for use as food are to be destroyed forthwith (U. S. C., Title 21, Secs. 71, 72).

Cf. *United States v. Lewis*, 235 U. S. 282; *Pittsburgh Melting Co. v. Totten*, 248 U. S. 1; *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479.

The Secretary of Agriculture is also authorized to prevent the interstate transportation of cattle affected with a communicable disease (23 Stat. 31, 32 Stat. 791, 33 Stat. 1264, U. S. C., Title 21, Sec. 111 *et seq.*). By regulation he has required that cattle in infected areas be inspected and dipped in curative solutions. His power to require such dipping has been sustained not only as to cattle ranging across state lines, *Thornton v. United States*, 271 U. S. 414, but also as to domestic cattle in diseased areas which might infect cattle moving in interstate commerce. *Carter v. United States*, 38 F. (2d) 227 (C. C. A. 5th), certiorari denied, 281 U. S. 753.

The same principle has been given effect with respect to transactions occurring after the interstate journey has been completed. The Food and Drugs Act (34 Stat. 768, U. S. C., Title 21, Sec. 2) prohibits interstate commerce in misbranded foods. It has been held that this statute applies to the labeling of articles on the retailers' shelves after interstate transportation has ceased, so as to preclude a state from enforcing inconsistent labeling regulations as to such goods. *McDermott v. Wisconsin*, 228 U. S. 115. The Court recognized the power of Congress to "determine for itself the character of the means necessary to make its pur-

pose effectual in preventing the shipment in interstate commerce of articles of a harmful character" (*ibid.* at 135).

These illustrations demonstrate the power of Congress to supplement regulations of interstate transportation by ancillary measures applying before or after the interstate journey. It has the same power with respect to goods produced under substandard labor conditions for interstate commerce. The transportation of such goods is in itself made unlawful by Section 15 (a) (1). And Congress is not required to withhold its hand until the employer has started the goods on their interstate journey. Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41-42. Direct prohibition of such conditions in the production of goods for interstate commerce manifestly tends to effectuate and implement the policy of keeping goods manufactured under those conditions out of commerce. It was within the power of Congress to adopt this means of achieving its legitimate object.

2. *The Section Prevents Unfair Competition in or Affecting Interstate Commerce.*—Even if Section 15 (a) (2) be regarded as entirely independent of Section 15 (a) (1) and as a separate regulation of the wages and hours obtaining in the production of goods for interstate commerce, it would be valid as a regulation directly affecting interstate commerce. This conclusion must be

reached whether the section be viewed as a means of controlling competition in interstate commerce or as preventing labor disputes from interrupting that commerce. We shall discuss the former approach in this subsection.

In Section 2 of the Act Congress found, *inter alia*:

* * * that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; * * * (3) constitutes an unfair method of competition in commerce; * * * (5) interferes with the orderly and fair marketing of goods in commerce.

The substance of these findings is that the employers who pay the lowest wages obtain an unfair advantage which diverts interstate trade to them at the expense of their competitors. That this finding clearly portrays conditions which would in themselves be subject to judicial notice has been amply demonstrated (*supra*, pp. 20-41).

Since the Fair Labor Standards Act imposes minimum labor standards only upon employers who sell or ship in interstate commerce, or who

produce goods for that commerce, it is restricted in its scope to persons engaged in interstate competition. Thus, the issue presented is whether Congress has power to regulate practices which are a means of competition in interstate commerce.

That question can no longer be regarded as an open one. The Sherman Act, the Clayton Act, and the Federal Trade Commission Act was each enacted in exercise of such a power. The cases arising under these familiar statutes outlaw various types of commercial practices affecting interstate competition. Their primary purpose is to eliminate practices deemed inimical to the public welfare which give persons using them an advantage over their competitors, and divert interstate trade from those whose standards better comport with the public interest.

The determination of what practices are against public policy is obviously a legislative matter. It is for Congress to decide whether low labor standards are as harmful as penny candy lotteries⁵ or price discrimination.⁶ But, so far as the scope of the commerce power is concerned, the nature of the practice is not material, as long as it does in fact divert the course of interstate trade from one competitor to another.

⁵ *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 303.

⁶ *Van Camp & Sons v. American Can Co.*, 278 U. S. 245; *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied, 282 U. S. 899.

This power to prevent particular methods of interstate competition has been sustained without regard for the interstate or intrastate situs of the transaction itself. The cases under the antitrust laws and the Federal Trade Commission Act generally assume, with little or no discussion, that the statutes apply as long as interstate competition is affected. This Court is fully familiar with the many cases applying the Sherman Act to intrastate transactions.⁷ The Federal Trade Commission Act has also frequently been applied to intrastate practices affecting interstate competition.⁸

In the application of Section 7 of the Clayton Act, which forbids the acquisition by one corporation engaged in commerce of stock in another so engaged where interstate competition will be lessened, it has never been thought material whether

⁷ See e. g., *Northern Securities Co. v. United States*, 193 U. S. 197; *Swift and Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *Duplex Printing Co. v. Deering*, 254 U. S. 443; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *Local 167 v. United States*, 291 U. S. 293; *Apex Hosiery Co. v. Leader*, No. 638, October Term, 1939.

⁸ See *Federal Trade Commission v. Eastman Kodak Company*, 7 F. (2d) 994 (C. C. A. 2d), affirmed on another ground, 274 U. S. 619; *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. (2d) 673 (C. C. A. 8th); *National Harness Mfrs. Assn. v. Federal Trade Commission*, 268 Fed. 705 (C. C. A. 6th); *Temple Anthracite Coal Company v. Federal Trade Commission*, 51 F. (2d) 656 (C. C. A. 3d); see *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 647.

The question whether the Federal Trade Commission Act should be construed to apply to intrastate sales has been pre-

the acquisition of stock was interstate or intrastate so long as interstate competition in the commodities produced by the corporations was suppressed.*

In *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied, 282 U. S. 899, it was held to be sufficient to establish a violation of Section 2 of the Clayton Act (38 Stat. 730, 15 U. S. C., Sec. 13), that a price discrimination in connection with intrastate sales lessened competition in interstate commerce between two purchasing companies. Compare *Van Camp & Sons v. American Can Co.*, 278 U. S. 245.

These illustrations are sufficient to demonstrate the power of Congress to prevent the diversion of interstate trade to competitors engaged in practices deemed harmful to the public interest. A corresponding power must exist for those acts proscribed by the Fair Labor Standards Act which

sented to this Court by petition for a writ of certiorari (*Federal Trade Commission v. Bunte Bros.*, No. 85, this Term, 110 F. (2d) 412 (C. C. A. 7th)). The question raised in that case is solely one of statutory construction and the court below did not suggest the absence of constitutional power to control intrastate sales or methods which injure interstate commerce.

* *Federal Trade Commission v. Western Meat Company*, 272 U. S. 554; *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291; *Arrow-Hart and Hegeman Electric Company v. Federal Trade Commission*, 291 U. S. 587; *Aluminum Co. of Am. v. Federal Trade Commission*, 284, Fed. 401 (C. C. A. 3d), certiorari denied, 261 U. S. 616; *Temple Anthracite Coal Company v. Federal Trade Commission*, 51 F. (2d) 656 (C. C. A. 3d). See *Northern Securities Co. v. United States*, 193 U. S. 197.

Congress now deems to be detrimental to the welfare of the nation. The low wages of some competitors divert interstate trade to just as great an extent as do the practices forbidden by the Federal Trade Commission Act. The Fair Labor Standards Act, which is limited in its operation to employees who are engaged in interstate commerce or in the production of goods for such commerce, thus affords merely another illustration of the settled power of Congress to insure fair standards among interstate competitors.

3. *The Question is Settled by the Labor Board Cases.*—Perhaps the shortest answer to the attack upon Section 15 (a) (2) is that it relates to employer-employee relationships which have already been established by the Labor Board cases as within the federal commerce power.¹⁰

Santa Cruz Packing Co. v. National Labor Relations Board, 303 U. S. 453, is most closely in point; it involved a vegetable packing company, which obtained raw materials within the state, processed them, and shipped thirty-seven percent of the finished product into interstate commerce. Indeed,

¹⁰ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38-40; *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Santa Cruz Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 463 *et seq.*; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604; and see *Apex Hosiery Co. v. Leader*, October Term, 1939, No. 638.

the lumber industry itself has repeatedly been held to be subject to the National Labor Relations Act.¹¹ Thus, there can be no question that the relations between appellee and his employees, who produce goods for interstate commerce,¹² are subject to the federal commerce power as exercised in the National Labor Relations Act.

That statute in terms applies to persons engaged in unfair labor practices "affecting" interstate commerce. The Fair Labor Standards Act, as the bill passed the House, followed the same pattern and applied to employers "engaged in commerce in an industry affecting commerce"; the Secretary

¹¹ *Carlisle Lumber Co. v. National Labor Relations Board*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *Carlisle Lbr. Co. v. National Labor Relations Board*, 99 F. (2d) 533 (C. C. A. 9th), certiorari denied, 306 U. S. 646; *National Labor Relations Board v. Carlisle Lbr. Co.*, 108 F. (2d) 188; *National Labor Relations Board v. Biles Coleman Lbr. Co.*, 94 F. (2d) 197, 98 F. (2d) 16, 98 F. (2d) 18; *National Labor Relations Board v. Connor Lbr. & Land Co.*, 102 F. (2d) 998 (C. C. A. 7th); *National Labor Relations Board v. Crossett Lbr. Co.*, 102 F. (2d) 1003 (C. C. A. 8th); *National Labor Relations Board v. Meadow Valley Lbr. Co.*, 101 F. (2d) 1014 (C. C. A. 9th); *National Labor Relations Board v. Red River Lbr. Co.*, 109 F. (2d) 157, 110 F. (2d) 810 (C. C. A. 9th); *M. & M. Wood Working Co. v. National Labor Relations Board*, 101 F. (2d) 938 (C. C. A. 9th); cf. *Bradley Lbr. Co. v. National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5th), certiorari denied, 299 U. S. 559.

¹² Under certain circumstances the Labor Relations Act has even been applied to employees neither engaged in interstate commerce nor in the production of anything to be shipped in commerce. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197.

of Labor was to determine after hearing which industries affected commerce. (H. Rept. 2182, 75th Cong., 3d Sess.). The Conference Committee, after the *Santa Cruz* decision, adopted a simpler formula.¹³ The delegation to the Secretary of Labor was eliminated, and the Act was expressly made applicable to employees engaged in the production of goods for commerce. The Fair Labor Standards Act in its general application thus is intended to, and by its terms does, apply only to some of the employees who prior to its enactment had been held subject to the protection of the National Labor Relations Act.

4. *The Section Prevents Labor Disputes Obstructive of Interstate Commerce.*—The Labor Board cases, indeed, are controlling here on the basis of their precise reasoning.

Section 15 (a) (2) serves, equally with the National Labor Relations Act, to prevent or minimize labor disputes which directly obstruct interstate commerce. In Section 2 of the Act Congress found:

* * * that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers * * * leads to labor disputes

¹³ H. Rept. No. 2738, 75th Cong., 3d Sess., p. 28. The legislative history does not give explicit indication that the *Santa Cruz* decision was the reason for the change.

burdening and obstructing commerce and the free flow of goods in commerce; * * *

This finding, too, states a fact of common knowledge. Even without official statistics we assume that the Court would take judicial notice of the fact that long hours and low wages, as much as the denial of the employees' right to bargain collectively, are a major cause of labor disputes and strikes. Indeed, the demand for collective bargaining on the part of employees generally arises as a result of unsatisfactory terms and conditions of employment.

Available data demonstrate that wages and hours, even to a greater extent than the right to bargain collectively, have been a fundamental cause of labor strife. Reports of the Bureau of Labor Statistics reveal that over a long period of years fifty percent of strikes have been caused by wages and hours alone and over sixty percent by wages and hours combined with the question of union recognition.¹⁴

The courts have frequently had before them cases indicating that divergent labor standards in competitive industries bring on industrial strife

¹⁴ See the Table in Appendix B, *infra*, pp. 151-154. The figures presented by the Government in the Labor Board cases also showed that wages and hours were the cause of more labor disputes than organization and collective bargaining. See *Associated Press v. National Labor Relations Board*, 301 U. S. 103, October Term, 1936, No. 365, brief for National Labor Relations Board, p. 144.

obstructive of commerce. In a number of familiar cases dealing with the violent and disastrous strikes in the coal industry from 1898 until relatively recent times, the strikes were caused primarily by the attempt of labor in the organized fields to prevent nonunion areas with lower wage scales from destroying their wage standards through the processes of competition.¹⁵ The same situation was found to have resulted in a violent dispute in the men's clothing industry. *Alco-Zander Co. v. Amalgamated Clothing Workers*, 35 F. (2d) 203 (E. D. Pa.). The cause of the controversy in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, was the retention by the Duplex Company of lower labor standards than its interstate competitors. See 254 U. S., at 480.¹⁶

The power of Congress to legislate for the purpose of preventing strikes obstructive of interstate

¹⁵ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 243; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 403-404; *International Organization v. Red Jacket C. C. & C. Co.*, 18 F. (2d) 839 (C. C. A. 4th), certiorari denied, 275 U. S. 536; *Pittsburgh Terminal Coal Corp. v. United Mine Workers*, 22 F. (2d) 559 (W. D. Pa.). See, also, National Labor Relations Board, Division of Economic Research, *The Effect of Labor Relations in the Bituminous Coal Industry Upon Interstate Commerce*, Bulletin No. 2, June 30, 1938.

¹⁶ Of four printing-press manufacturers in the United States, three recognized the defendant union and had granted their employees an eight-hour day and certain minimum wages. The Duplex Company had not. Two of the three union manufacturers notified the union that they would be obliged to terminate their agreements unless Duplex entered into a similar arrangement with equally high standards. The refusal of Duplex to do so brought on the strike and boycott involved in that case.

commerce is, of course, thoroughly established by the Labor Board cases. Unsatisfactory wages and hours are the most prolific cause of labor disputes. Congress has exercised its power to prohibit one important cause of labor disputes which obstruct commerce—the refusal of employers to recognize and deal with the freely chosen representatives of their employees. For precisely the same reason, Congress may seek to correct substandard labor conditions as a means of preventing and avoiding the other major cause of labor disputes which interfere with commerce.

5. *The Cases Relied Upon by Appellee.*—Appellee relies on *Schechter Poultry Corp. v. United States*, 295 U. S. 495, and *Carter v. Carter Coal Company*, 298 U. S. 238. Neither is controlling here.

The *Schechter* case is plainly distinguishable. The labor conditions there subjected to regulation were those of employees in local poultry houses in New York City which processed and then sold poultry to retailers in that city. The regulation thus applied to local activities after the poultry had come to rest at the end of the interstate journey. Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40. The Fair Labor Standards Act does not reach such persons, but applies only to employees engaged in commerce or in the production of goods for commerce.

In the *Carter Coal* case, a majority of the Court held that Congress lacked power to regulate hours

and wages and to require collective bargaining in the bituminous coal industry. The premise upon which the opinion rested was that conditions of labor were incidents of production, and that the power of Congress did not extend to the production of goods, regardless of how "substantial" was the effect on interstate commerce. That ruling is wholly inconsistent with the subsequent decisions of the Court holding that the commerce power extends to all intrastate transactions which directly or substantially affect interstate commerce, even though they occur during the course of production of goods in a mine or factory. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601; *National Labor Relations Board v. Bradford Dyeing Co.*, No. 588, October Term, 1939, decided May 20, 1940.

In three cases, the lower courts have held that the power of Congress extends to requiring collective bargaining by producers of coal whose coal is sold in interstate commerce. *Clover Fork Coal Co. v. National Labor Relations Board*, 97 F. (2d) 331 (C. C. A. 6th); *National Labor Relations Board v. Crowe Coal Company*, 104 F. (2d) 633 (C. C. A. 8th), certiorari denied, 308 U. S. 584; *National*

Labor Relations Board v. Good Coal Co., 110 F. (2d) 501 (C. A. A. 6th), certiorari denied May 6, 1940, No. 884. Certiorari was sought and denied in two of the cases. These decisions are, of course, squarely inconsistent with the *Carter* case. Although the majority of the Court has not expressly so stated, dissenting Justices have frequently declared ¹⁷ that the decisions in the Labor Board cases are inconsistent with the *Carter* case, and the Circuit Court of Appeals for the Ninth Circuit has held that case overruled. *Edwards v. United States*, 91 F. (2d) 767; *Santa Cruz Fruit Packing Co. v. National Relations Board*, 91 F. (2d) 790 (C. C. A. 9th), affirmed, 303 U. S. 453. Although we are confident that the case is no longer authoritative, it is still being pressed before lower courts, and, as the instant case demonstrates, is occasionally given considerable weight. Under these circumstances, the *Carter* case should be expressly overruled.

Defendants also have cited *Kidd v. Pearson*, 128 U. S. 1; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245; *United States v. E. C. Knight Co.*, 156 U. S. 1; and the *Coronado* cases.¹⁸ The *Kidd* case upheld a state statute prohibiting the manufacture of intoxi-

¹⁷ *Labor Board Cases*, 301 U. S. 1, 76; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 308 U. S. 453, 469-470; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 240-241; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 613.

¹⁸ *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295.

eating liquor, and the *Heisler* case a state tax. In *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, this Court, in answer to the same argument based upon the same cases, stated:

* * * Nor are the cases in point which are cited by petitioner with respect to the exercise of the power of the State to tax goods, which have not begun to move in interstate commerce or have come to rest within the State, or to adopt police measures as to local matters. In that class of cases the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority. *Bacon v. Illinois*, 227 U. S. 504, 516; *Stafford v. Wallace*, *supra*, p. 526; *Minnesota v. Blasius*, 290 U. S. 1, 8.

The *Knight* case, which held the Sherman Act inapplicable to a monopoly of virtually all of the sugar refineries in the United States is no longer authoritative. See *Standard Oil Co. v. United States*, 221 U. S. 1, 68-69; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 39. The *Coronado* cases "related to the applicability of the federal statute and not to its constitutional validity." *Apex Hosiery Co. v. Leader*, *supra*, Footnote 9; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40.

E. SECTIONS 11 (C) AND 15 (A) (5) ARE VALID

Court 12 of the indictment is based upon Sections 11 (c) and 15 (a) (5). Section 11 (c) requires every employer subject to the Act to keep such records of wages, hours, and conditions of employment as the Administrator by regulation or order shall prescribe;¹ Section 15 (a) (5) makes it unlawful to violate this requirement or knowingly to keep or make false records or reports. They plainly are ancillary to the regulatory sections of the Act. In order to enforce the wage and hour provisions Congress can, of course, compel the keeping of records which will disclose the wages paid and the hours worked by the employers and employees subject to the Act. *Fleming v. Montgomery Ward & Co.* (C. C. A. 7th), decided July 18, 1940, certiorari pending, No. 407, sustained the validity of these provisions.

Thus, once the constitutionality of the substantive sections is shown, the validity under the commerce clause of Sections 11 (c) and 15 (a) (5) inevitably follows. See *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *Chicago Board of Trade v. Olsen*, 262 U. S. 1; *Bartlett Frazier Co. v. Hyde*, 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654.

¹ The Regulations promulgated by the Administrator are found in Appendix A, *infra*, pp. 144-150.

Since appellee makes no separate attack upon these provisions, further consideration of them seems unnecessary.

II

THE FAIR LABOR STANDARDS ACT DOES NOT VIOLATE THE TENTH AMENDMENT

It has been shown that the Fair Labor Standards Act was enacted in exercise of the power granted Congress to regulate interstate commerce. This disposes of the argument that the Act violates the Tenth Amendment, which merely provides that—

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Language could not express more clearly that the Amendment does not reserve to the states any part of any power which is "delegated to the United States by the Constitution," nor indicate more plainly that the Amendment does not limit the scope of any power which is delegated to the United States. The amendment has no independent operation. It comes into effect only after a determination that an Act of Congress is not authorized under the granted powers.

These propositions seem self-evident. But the argument of appellee and several relatively recent decisions of this Court¹ suggest the desirability

¹ *Hopkins Savings Assn. v. O'Leary*, 296 U. S. 315, 335-336; *United States v. Butler*, 297 U. S. 1, 68; *Ashton v. Cameron County Dist.*, 298 U. S. 513, 527.

that we again call to the Court's attention the circumstances under which the Amendment was adopted and the numerous cases in which it has been understood to mean simply what it says. A rather more elaborate argument to that end has been presented by the Government in its briefs in *United States v. Bekins*, 304 U. S. 27; No. 757, October Term, 1937, and *Mulford v. Smith*, 307 U. S. 38, No. 505, October Term, 1938, and an argument similar to this in *Oklahoma v. Woodring*, 309 U. S. 623, No. —, Orig., October Term, 1939. In none of these cases has the Court found it necessary to make explicit mention of the Tenth Amendment. Since the Court has not made wholly clear its own adherence to the view that the Tenth Amendment offers no independent limitation upon the federal powers, we again present a compressed statement of the fuller discussion found in the earlier briefs.

1. *The Adoption of the Tenth Amendment.*—

The first ten amendments are a close adaptation of those proposed by Massachusetts in ratifying the Constitution.² Because the omission of a bill of rights was generally regarded as the most vulnerable point in the proposed charter,³ John Hancock, president of the Massachusetts Convention, pro-

² The first of the nine recommendations of Massachusetts read: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised" (*Elliot's Debates*, I, 322).

³ Warren, *The Making of the Constitution*, p. 769.

posed the amendments "in order to remove the doubts and quiet the apprehensions of gentlemen" (Elliot's *Debates*, II, 123).⁴

The discussion in the ratifying conventions confirms the plain meaning of the words of the Tenth Amendment, and indicates that the proponents wished merely to insure that the central government would in truth be one of delegated powers.⁵ The delegates who opposed the amendment did so largely on the ground that it was unnecessary, if not dangerous.⁶ The anxiety for this declaratory rule of construction may be traced to two fears: that the national government might assert the right

⁴ Thereafter four States which ratified the Constitution similarly expressed their earnest hope for a bill of rights. Elliot's *Debates*, I, 325-332. It may be noted that only in Massachusetts and New Hampshire was the Tenth Amendment offered as an amendment (*id.*, I, 322, 326); in South Carolina, Virginia, and New York it was set forth as declaratory of the conventions' understanding of the construction of the Constitution (*id.*, I, 325, 327). Maryland ratified without attaching proposed amendments, but a minority of its convention addressed a statement to the people of that State, explaining that the Constitution was "very defective," and recommending various amendments, including one similar to the Tenth Amendment (*id.*, II, 547, 550, 555).

⁵ Massachusetts: Adams and Jarvis (*id.*, II, 131, 153); Virginia: Mason and Grayson (*id.*, III, 442, 449); North Carolina: Bloodworth (*id.*, IV, 167).

⁶ Massachusetts: Varnum (*id.*, II, 78); Virginia: Nicholas, Randolph, and Madison (*id.*, III, 450, 464, 600, 620, 626); North Carolina: Maclaine and Iredell (*id.*, IV, 140, 149); South Carolina: Pinckney (*id.*, IV, 315-316); Pennsylvania: Wilson and M'Kean (*id.*, II, 435-436, 540).

to exercise powers not granted,' and that the states would be unable fully to exercise the powers which the Constitution had not taken from them.*

When the proposed amendments were introduced by Madison in the first Congress, "to give satisfaction to the doubting part of our fellow-citizens" (1 Annals of Congress 432), he viewed the Tenth Amendment as merely declaratory (1 Annals 441):

I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.

There was no other explanatory statement in the briefly recorded debate on this amendment.⁹ Even

⁹ North Carolina: Bloodworth (Elliot's *Debates*, IV, 167): Virginia: Henry (*id.*, III, 446).

⁹ Virginia: Grayson, Henry, Mason (*id.*, III, 449, 446, 441). For the possible convenience of the Court, citations to additional discussion of the proposals which became the Tenth Amendment are: *Id.*, II, 153, 540; III, 464, 538, 589, 622.

⁹ Madison, in the course of debate on Hamilton's bank proposal, on February 2, 1791, when nine states had ratified

the original reservation in the Articles of Confederation of powers not "expressly" delegated, it is to be noted, was intended by the Continental Congress to do no more than to preserve the autonomy of the states.¹⁰ But the adoption of the Tenth Amendment was accompanied by a deliberate refusal to reserve to the states all powers not "expressly" granted to the national government.¹¹ While Madison's proposals for new amendments were under consideration in Congress, Tucker and

the amendments which he had proposed, said (2 Annals 1897):

"Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."

¹⁰ Thomas Burke, writing to Governor Caswell from the Congress, on April 29, 1777, said the proposed articles originally "expressed only a reservation of the power of regulating the internal police, and consequently resigned every other power. It appeared to me that this was not what the States expected, and, I thought, it left it in the power of the future Congress * * * to make their own power as unlimited as they please." Burke accordingly proposed the article which, after two days of spirited debate, was adopted 11-1, with one state divided. 7 Journals of Cont. Cong. 122-123.

¹¹ This was the wording of Article II of the Articles of Confederation, of the Massachusetts (footnote 2, *supra*, p. 91) and New Hampshire (Elliot's *Debates*, I, 326) proposals, of the South Carolina declaration (*id.*, I, 325), and of the statement of the minority of the Maryland convention (*id.*, II, 550). New York referred to powers "clearly" delegated (*id.*, I, 327). Only Virginia, in its declaration, made no such qualification (*id.*, I, 327).

Gerry each moved to amend this proposal so as to reserve to the states the powers not *expressly* delegated; each motion was defeated (1 Annals of Congress 761, 767-768). Whether or not a reservation to the states of powers not expressly delegated would have impaired the last clause of Section 8 of Article I, granting powers "necessary and proper", it is plain that there was a deliberate choice of the Congress to except from the reservation to the states the powers granted to Congress by implication. This choice cannot be squared with any argument that appropriate federal powers cannot be exercised because of the operation of the Tenth Amendment.

The men who proposed the Tenth Amendment seem, then, to have been quite clear that the Amendment was simply declaratory of the evident proposition that Congress could not constitutionally exercise powers not granted to it, and that these powers could continue to be exercised by the states.¹²

¹² As Story said (Story, *Commentaries on the Constitution*, secs. 1907-1908):

"This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. * * *

"It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect as an abridgement of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. * * *

2. *The Judicial History of the Amendment.*—

The plain purpose of the Amendment has been confirmed by more than a century of constitutional history. The decisions of this Court have reiterated that the Tenth Amendment offers no independent limitation upon the powers granted to the United States but merely states the unquestioned principle that the central government is one of enumerated powers.

This was the interpretation of the Tenth Amendment when, in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 325, it was first considered by this Court.¹³ Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, said that the amendment "was framed for the purpose of quieting the excessive jealousies which had been excited" and that it left open the question "whether the particular power * * * has been delegated to the one government, or prohibited to the other" (4 Wheat. at 405, 406).¹⁴ Taney, as well, accepted this self-evi-

¹³ In 1808 in *United States v. The Brigantine William*, 20 Fed. Cas. No. 16,700 (D. Mass.), Judge Davis, a member of the Massachusetts Convention, stated with respect to the powers of the states that (p. 622): "The general position is incontestible, that all that is not surrendered by the constitution, is retained. The amendment which expresses this is for greater security; but such would have been the true construction, without the amendment."

¹⁴ Even Luther Martin, Attorney General of Maryland, conceded in the course of argument that the amendment meant what it said, that it was merely "declaratory of the sense of the people" and designed to allay an apprehension which the federalists "treated as a dream of distempered jealousy" (4 Wheat., at 372, 374).

dent proposition. *Gordon v. United States*, 117 U. S. 697, 705 (1864). This Court has continued to treat the Tenth Amendment as containing no limitation on the powers granted to the United States. *Champion v. Ames*, 188 U. S. 321, 357; *Northern Securities Co. v. United States*, 193 U. S. 197, 344-345; *Everard's Breweries v. Day*, 265 U. S. 545, 558. It has recognized, as in *United States v. Sprague*, 282 U. S. 716, 733, that "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted * * *. It added nothing to the instrument as originally ratified * * *."

However, the clarity of these decisions has been obscured by several of the recent opinions of this Court, which have indicated a view that the Tenth Amendment contained an independent limitation on the powers of Congress. *Hopkins Savings Assn. v. Cleary*, 296 U. S. 315, 335-336; *United States v. Butler*, 297 U. S. 1, 68 (but compare *Mulford v. Smith*, 307 U. S. 38); *Ashton v. Cameron County Dist.*, 298 U. S. 513, 527 (but compare *United States v. Bekins*, 304 U. S. 27). And see the approach adopted in the opinions in *Steward Machine Co. v. Davis*, 301 U. S. 548, 585-592; *Helvering v. Davis*, 301 U. S. 619, 640-645; and *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 312.

In none of these opinions did the Court explicitly announce a departure from its historic treatment of the Tenth Amendment, and they hardly can be

thought to have overruled *sub silentio* so important a constitutional doctrine. Particularly is this the case when other, and contemporaneous, decisions retain the accepted interpretation of the Tenth Amendment. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330-331; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (cf. p. 97); *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (cf. p. 105); *Mulford v. Smith*, 307 U. S. 38 (cf. pp. 52-53, 55-56); *Sonzinsky v. United States*, 300 U. S. 506 (cf. p. 508); *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 516; see *United States v. California*, 297 U. S. 175, 184.

The plain meaning of the language of the Tenth Amendment, the circumstances of its adoption, and a century of constitutional litigation support the approach represented by the opinions last cited. We respectfully submit that it should be adopted in this case. Any other rule must condemn constitutional interpretation to a perpetual servitude to sophistry and contradiction; neither layman nor scholar can ever be expected to contrive a satisfactory touchstone by which to determine what powers delegated to the national government may not be exercised because reserved to the states as a power "not delegated to the United States."

III

THE FAIR LABOR STANDARDS ACT DOES NOT VIOLATE
THE FIFTH AMENDMENT

A. THE QUESTION IS PROPERLY BEFORE THIS COURT

Appellee raised and argued the question of due process in the District Court. But that court did not hold that the Fair Labor Standards Act violated the Fifth Amendment. On the contrary, in a decision handed down the same day sustaining the validity of the Act as applied to railroad employees, the court rejected the argument that the Act contravened the due process clause.¹

The general rule is that a respondent or appellee may offer any argument in support of the judgment below, at least when made in the lower court. *Langnes v. Green*, 282 U. S. 531. This rule was held applicable to the raising of various constitutional objections under the Criminal Appeals Act in *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 330. Although the Court in *United States v. Borden Co.*, 308 U. S. 188, 207, refused to hear argument on questions of statutory construction not

¹ *Morgan v. Atlantic Coast Line Railroad*, 32 F. Supp. 617 (S. D. Ga., Waycross Division), decided April 29, 1940. The court entered the following conclusion of law: "The establishment of minimum wages by Congress by the Fair Labor Standards Act is not arbitrary or capricious or an unreasonable interference with liberty of contract in violation of the due process clause of the Fifth Amendment."

decided by the district court, it reaffirmed the holding in the *Curtiss-Wright* case, since there "the decision of the District Court was not based upon a particular construction of the underlying statute, but upon its invalidity."

Since the question of due process relates to the validity of the underlying statute in the instant case, the *Curtiss-Wright* case controls here.² Accordingly, we believe that the due process issues raised and argued by appellee are properly before the Court. We shall, therefore, address the remainder of this brief to those questions.

The appellee's arguments are that the Fair Labor Standards Act is arbitrary, capricious and thus violative of due process because it (1) unduly interferes with liberty of contract; (2) fixes a uniform and inflexible standard for the entire country; (3) discriminates in favor of agriculture in general, and the producers of naval stores in particular; and (4) is too indefinite to apprise citizens as to whether or not they are subject to the Act. There is no substance to any of these contentions.

² If the Court should no longer regard the distinction between the *Curtiss-Wright* and the *Borden* cases as satisfactory, we submit that for reasons stated in the opinion the former case correctly applies the Criminal Appeals Act to those matters which are subject to review under it, and that the *Borden* case was wrongly decided on this point.

B. THE ACT DOES NOT UNDULY LIMIT LIBERTY OF
CONTRACT

It should be pointed out as a preliminary matter (with reference to this and the two succeeding points) that appellee can rely upon no fact in the record, and has as yet presented none which is subject to judicial notice, to show that the legislation is arbitrary. The burden of supporting the charge of unconstitutionality is, of course, on the assailant of the statute. In the absence of facts demonstrating its invalidity the constitutionality of the law must be presumed. *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153; *Metropolitan Ins. Co. v. Brownell*, 294 U. S. 580, 584, and cases cited. But, even without the aid of presumptions, the Act seems plainly valid.

The due process clause imposes no greater restriction upon federal legislation in the field of interstate commerce than upon state legislation regulating intrastate activities. *Nebbia v. New York*, 291 U. S. 502, 524; *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 571; *Sunshine Anthracite Coal Co. v. Adkins*, October Term, 1939, No. 804. Congress has full authority to exercise "the police power, for the benefit of the public, within the field of interstate commerce." *Brooks v. United States*, 267 U. S. 432, 436; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334, 347; *United States v. Carolene Products Co.*, *supra*, at p. 147; *Curran v. Wallace*, 306

U. S. 1, 11-12. Thus if a state wage and hour law similar to the Fair Labor Standards Act would not violate the Fourteenth Amendment, the federal statute does not transgress the Fifth Amendment.

This Court has sustained the power of the states to fix maximum hours for women³ and for men engaged in industrial occupations,⁴ and has sustained the device of implementing maximum hour provisions by requiring extra pay for overtime.⁵ It has sustained the right of the states to prescribe minimum wages for women generally.⁶ It has sustained the power of Congress and the states to establish minimum wages for men in certain occupations or under special circumstances.⁷ These decisions, which uphold statutes restricting freedom of contract to the same extent as does the Fair Labor Standards Act, would seem clearly to be controlling here. They are conclusive of the validity of the Fair Labor Standards Act under the due process clause with respect to the maximum hour provi-

³ *Muller v. Oregon*, 208 U. S. 412; *Riley v. Massachusetts*, 232 U. S. 671; *Hawley v. Walker*, 232 U. S. 718; *Miller v. Wilson*, 236 U. S. 373; *Bosley v. McLaughlin*, 236 U. S. 385.

⁴ *Holden v. Hardy*, 169 U. S. 366; *Bunting v. Oregon*, 243 U. S. 426; cf. *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612.

⁵ *Bunting v. Oregon*, 243 U. S. 426.

⁶ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379.

⁷ *Wilson v. New*, 243 U. S. 382 (wages and hours of railroad employees in an emergency); *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420 (fees of stockyard commission men); *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U. S. 251 (commissions of insurance agents); *Townsend v. Yeomans*, 301 U. S. 441 (fees for tobacco warehousemen).

sions, and of the minimum wage provisions as applied to women. All that is not definitely foreclosed by prior decision is the status of a general law providing for minimum wages for male employees.

It would be a work of supererogation to set forth in detail the reasons why minimum wage legislation does not transgress "whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power."^{*} The arguments have been powerfully marshalled in this Court's opinion in the *West Coast Hotel* case, and there is little or nothing which can be added here. That opinion, in briefest summary, points out that the wage term of a contract between employer and employee, since they often are not in a position of equality, is a fitting subject of legislative regulation to protect the interest of the state in the health and welfare of its citizens and to protect the community against an enforced "subsidy for unconscionable employers." The Court concluded that (*id.* at 398-399) "the legislature was entitled to adopt measures to reduce the evils of the 'sweating system', the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition."

No economic or statistical material was before the Court in the *West Coast Hotel* case, but the

^{*} *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, October Term, 1939, No. 681, decided June 3, 1940.

Court nevertheless took judicial notice of "what is of common knowledge through the length and breadth of the land" (*id.*, at 399). Inasmuch as the validity of the present statute is demonstrated by precisely the same factors, an extensive review here of economic material which proved the obvious would impose a needless burden on the Court. It should be sufficient to refer in the margin to some part of the voluminous source material which demonstrates in detail that low wages and long hours are harmful to the health and well-being of employees and their families.*

* United States Public Health Service, Public Health Bulletin No. 73, *Tuberculosis Among Industrial Workers*, pp. 16-17 (1916); *Id.*, Reprint No. 492, from Public Health Reports No. 47, Vol. 33, p. 16 (1918), *Disabling Sickness Among the Population of Seven Cotton-mill Villages of South Carolina in Relation to Family Income*; *Id.*, Reprint No. 1656, Public Health Reports, Vol. 49, No. 44 (1934), *The Relation between Housing and Health*; *Id.*, National Health Survey 1935-1936, Sickness and Medical Series, Bulletin No. 2 (1936); *Id.*, Bulletin No. 5; *Id.*, Bulletin No. 9; *Id.*, Report 1684 from Public Health Reports, Vol. 50, No. 18 (1935), *Relation of Sickness to Income and Income Change in Ten Surveyed Communities*; *Id.*, Public Bulletin No. 237 (1937), *Illness and Medical Care in Puerto Rico*; United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 75, *Industrial Hygiene*, by George M. Kober, pp. 534-536 (1908); United States National Emergency Council, *Report on Economic Conditions of the South*, pp. 29-35 (1938); A. M. Woodbury, *Infant Mortality and its Causes* (1926); Cleveland Health Council, Howard Whipple Green, *Infant Mortality and Economic Status* (1939); Social Science Research Council, Collins and Tibbits, *Research Memorandum on Social Aspects of Health in the Depression*; National Housing Association, Pro-

In the court below appellee sought to distinguish the *West Coast Hotel* case upon three grounds. We shall discuss each asserted distinction.

1. Appellee urges that the *West Coast Hotel* case does not reach to men. Since the Washington statute involved in that case was concerned only with women, the Court's opinion does, of course, cite proceedings of the Eighth National Conference on Housing (1920), *Room Overcrowding and its Effect upon Health*, by Henry F. Vaughan, Commissioner of Health, Detroit, Michigan; Federal Council of the Churches of Christ in America, *The Family, Past and Present*, pp. 355-356 (1938) (edited by Bernhard Stern); Sen. Doc. No. 645, 61st Cong., 2nd Sess., *Report on Condition of Women and Child Wage Earners in United States* (1911), Vol. XV, p. 93; The Crime Commission of New York State, *From Truancy to Crime—A Study of 251 Adolescents* (1928); M. G. Caldwell, *The Economic Status of Families of Delinquent Boys in Wisconsin*, American Journal of Sociology, September 1931, Vol. 37, No. 2, p. 239; E. H. Sutherland, *Criminology*, p. 169 (1924); George M. Kober, *Etiology and Prophylaxis of Occupational Diseases* (taken from Diseases of Occupational and Vocational Hygiene), pp. 447-448 (1916); Josephine Goldmark, *Fatigue and Efficiency* (1912); H. Mosso, *Fatigue*, translated by Margaret and W. B. Drummond (1904); Dr. Franz Koelsch, *Arbeit und Tuberkulose*, *Archiv für Soziale Hygiene* (1911), Vol. 1, p. 212; R. A. Spaeth, *The Problem of Fatigue*, Journal of Industrial Hygiene, p. 37, May 1919; F. S. Lee, *The Human Machine and Industrial Efficiency*, p. 45 (1918); Felix Frankfurter and Josephine Goldmark, *The Case for the Shorter Work Week* (1915), pp. 63-359; P. Sargent Florence, *Economics of Fatigue and Unrest*, p. 329 (1924); W. K. Kellogg, *Five Years under the Six-Hour Day*, p. 15 (1936). Additional material is compiled in the briefs in support of the statutes involved in *Stettler v. O'Hara*, 243 U. S. 629, October Term, 1916, No. 25, and *Adkins v. Children's Hospital*, 261 U. S. 525, October Term, 1922, No. 795.

emphasize the importance of safeguarding the health of women. But in every respect its reasoning applies equally as well to men. Indeed, it was argued in that case that the statute was invalid because it did not prescribe minimum wages for men as well as for women, that men would get the jobs denied to women by the statute, and that the statute thus discriminated against women. The Court rejected this argument on the ground that it was not essential to its validity that the law extend to all the evils "to which it might have been applied" (300 U. S., at 400).

The Supreme Court of Oklahoma, on the authority of the *West Coast Hotel* case, sustained a state law regulating the wages of men and women alike. *Associated Industries of Oklahoma v. Industrial Welfare Commission*, 90 P. (2d) 899.

We do not believe that it will be argued by appellee that the community has no interest in preserving the health of males. The argument would be ridiculous in the face of the great mass of health legislation, both state and federal, enacted in the interest of all citizens regardless of sex. And, if it were necessary to relate the Act to the health of women, it need only be noted that the intimate connection between the wages of men and the health and well-being of women and children is also a matter of common knowledge. Men more often than women are the sole wage earners for families, and the payment of excessively low wages to male workers is inevitably injurious to more women than is the payment of similar wages to female employees.

That the fixing of minimum wages for men does not violate the due process clause is also shown by *Bunting v. Oregon*, 243 U. S. 426, sustaining the validity of a maximum hour law for male workers. After the decision in the *West Coast Hotel* case, expressly disapproving the distinction made in the *Adkins* case between laws regulating maximum hours and those fixing minimum wages (300 U. S. at 395-396), the *Bunting* case is controlling here.

2. Appellee also contended in the court below that the *West Coast Hotel* case does not apply because the minimum wage prescribed under the Fair Labor Standards Act takes no account of the value of the services rendered. We do not believe that appellee can show that Congress did not take this factor into account in determining what the statutory minimum should be. On the contrary, Congress required the industry committees specifically to consider the wages established by collective labor agreements and those paid voluntarily by employers who maintained minimum wage standards in proposing wages above the basic statutory minima (Section 8 (c)). Such amounts obviously have a relation to the value of the service rendered. The establishment of minima of twenty-five and thirty cents, below which wages could never be reduced, suggests that Congress was of the opinion that under all circumstances¹⁰ the value of the services would equal these sums.

¹⁰ The Act provides for wages lower than the minimum for learners, apprentices, and handicapped workers (Section 14).

In any event, the short answer to this argument is that neither the Washington statute involved in the *West Coast Hotel* case, nor the federal statute in the *Adkins* case,¹¹ provided that the value of services should be taken into consideration. Indeed the majority opinion in the *Adkins* case (261 U. S. 525, 557-558) and the minority in *West Coast Hotel* case (300 U. S. at 408-411), relied heavily on the failure to take this factor into account. The present case can not be distinguished from the earlier cases on this ground.

3. Appellee also seeks to distinguish the Fair Labor Standards Act from the Washington Minimum Wage Law on the ground that the federal Act itself prescribes the minimum wage, whereas the Washington statute authorized an administrative body to fix the wage in accordance with specified standards. The thought apparently is that quasi-legislative action of an administrative tribunal, if based upon a hearing, has constitutional sanctity which legislation itself does not possess.

It is a novel suggestion that the failure of Congress to delegate legislative power makes a law unconstitutional. The bill which became the Fair Labor Standards Act originally contained much more sweeping grants of power to the administration and these were narrowed because of objection

¹¹ Since the Court's opinion in the *West Coast Hotel* case accepts the view of the minority in the *Adkins* case and overrules that decision, it is clear that the statute involved in the latter case was also constitutional.

to the breadth of the delegation."¹² Certainly the due process clause does not compel Congress to delegate its functions to administrative bodies.

C. THE ACT IS NOT ARBITRARY BECAUSE ITS BASIC
MINIMUM IS NATION-WIDE

It has been contended that the Fair Labor Standards Act is arbitrary because it establishes a uniform standard for the entire nation without differentiation because of varying conditions in diverse industries and regions.

¹² S. 2475, 75th Cong., 1st Sess. This bill, which passed the Senate on July 31, 1937 (81 Cong. Rec. 7957), authorized an administrative body to prescribe minimum wages and maximum hours for particular employments and classes of employment in accordance with specified standards. See S. Rept. No. 884, H. Rept. No. 1452, 75th Cong., 1st Sess. After extensive criticism of this feature of the bill in debate on the floor (82 Cong. Rec. 1387, 1391, 1395-1398, 1400, 1403-1404, 1470, 1472, 1482, 1487-1493, 1497, 1812-1813, 1832), the House voted to recommit this bill on December 17, 1937 (82 Cong. Rec. 1835). At the next session the House Committee on Labor reported a revised measure which itself prescribed uniform and inflexible wages and maximum hours for all the industries subject to the Act (H. Rept. No. 2182, 75th Cong., 3d Sess.). Although this bill was criticized as too inflexible (83 Cong. Rec. 7275-7326, 7373-7448), it passed the House on May 24, 1938 (83 Cong. Rec. 7449-7450). The conference committee brought out as a compromise a bill which itself contained the basic minimum standards but provided for a certain amount of flexibility above these minima (83 Cong. Rec. 9158-9165, 9246-9266). The conference report (H. Rept. No. 2738, 75th Cong., 3d Sess.) summarizes the provisions of the Senate bill (pp. 13-20), the House bill (pp. 21-27), and the Act as passed (pp. 28-33).

In the first place, it should be noted that the Act does not prescribe the same minimum wage for all employees in all industries. It provides for the establishment of industry committees with authority to recommend wages between the basic minima of twenty-five cents and thirty cents and a maximum of forty cents for each industry; appropriate subclassification within each industry in accordance with specified standards is permitted (Section 8). Such recommendations become operative if approved by the Administrator.

Thus, it cannot be objected that the statute fails to give any consideration to varying conditions, but only that under no circumstances is the minimum permitted to be less than twenty-five cents per hour during the first year and thirty cents thereafter. Congress certainly has the power to decide for itself what amount is essential for securing the necessities of life and to make that the minimum wage. Only if it could be proved that the amount selected was so high that no rational person could regard it as suitable for the purpose for which it was chosen could this objection have any substance.

The twenty-five cents an hour minimum which applied to the year during which this case arose gave an employee, if he were to work full time, a weekly wage of eleven dollars and an annual income, if he worked for 52 weeks, of \$572. Even the thirty cents required during subsequent years would amount only to \$12.60 a week and \$655.20 a

year. These amounts might well be criticized as being too low to achieve the purposes of the Act, but appellee is not complaining on that score. It was assumed by Congressmen supporting the bill that the minimum standards prescribed were obviously not in excess of what would be required for subsistence.¹³ A comparison of the wages fixed after hearing by minimum wage boards of the states and the District of Columbia discloses that the vast majority have found that rates higher than those fixed in the Fair Labor Standards Act are essential to provide the minimum cost of living.¹⁴ Numerous surveys and estimates by official sources and secondary authorities place the amount necessary for the mere subsistence of a family in all parts of the country at considerably more than the minimum wage established by the Fair Labor Standards Act.¹⁵

¹³ 82 Cong. Rec. 1472, 1505, 1797-1798; 83 Cong. Rec. 7276, 7279, 7290, 7307, 7308, 7324, 7382-7383, 7386, 9163, 9171, 9175, 9360, 6364.

¹⁴ See United States Department of Labor, Women's Bureau Bulletin 167, *State Minimum Wage Laws and Orders: An Analysis* (1938), and Supplement (1939). Eighty-seven percent of the rates set for women in manufacturing industries exceeded the twenty-five-cent hourly minimum fixed in the federal act and seventy-two percent are thirty cents an hour or more. *Id.* (1938), p. 2.

¹⁵ United States Department of Labor, Women's Bureau, *State Minimum Wage Budgets for Women Workers Living Alone*, November 1938 (the minimum for the maintenance of health for single women in three northeastern states and the District of Columbia, \$1,094.83); Works Progress Administration, Division of Research, *Intercity Differences in*

These studies further indicate that the differences between large and small communities and different regions of the country are not nearly as great as might be anticipated.¹⁶ If wages in a particular

Cost of Living, 1935 (1937) (cost of basic maintenance standard of living for a family of four persons, \$1,260, and emergency standard of living, \$903); National Industrial Conference Board Bulletin, Vol. XII, No. 10, October 17, 1938 (average cost of living in 1938 for a family of four persons, \$1,332); C. R. Daugherty, *Labor Problems in American Industry* (1938), pp. 138-145 (minimum health and decency standard in 1935 for man, wife, and two children, \$1,460; minimum of subsistence level, over \$730); Paul H. Douglas, *Wages and the Family* (1925) (minimum of subsistence level, \$1,100-1,400; minimum health and efficiency level, \$1,500-\$1,800). See also Abraham Epstein, *Insecurity, a Challenge to America* (1938), pp. 97-98.

¹⁶ *Differences between Regions*.—United States Department of Labor, Bureau of Labor Statistics, Serial No. R 963, Reprint from Monthly Labor Review, July 1939, *Differences in Living Cost in Northern and Southern Cities* (cost in five small southern cities 3.1 percent lower than in five northern cities of the same size; food prices were the same, and lower house and fuel cost in the south partially offset by higher cost of clothing, furniture and other equipment); Works Progress Administration, Division of Research, *Intercity Differences in Cost of Living* (maintenance level for a family of four in northern cities \$1,285, in southern cities \$1,208; emergency level in two lowest cities: \$814.92 in Mobile, Alabama, and \$809.64 in Wichita, Kansas; average for 59 cities \$903.27); National Industrial Conference Board, *op cit.*, note 15, *supra*, pp. 86 and 90 (difference between highest in east and lowest in south, 10.2 percent); *id.*, Research Report No. 22 (1919) and Special Report No. 8 (1927) (comparison of costs in Fall River, Massachusetts, and three southern mill towns shows highest cost in the south); see, also, *id.*, *Differentials in Industrial Wages and Hours in the United States* (1938); Elizabeth Ellis Hoyt, *Consumption in our Society*

section of the country are frequently lower than the statutory minimum, it is not because the minimum is high but because the economic condition of the employees in that section are far below the subsistence level. Thus, even assuming that diverse conditions in different industries and regions might call for varying minima if the standards were high, a uniform amount fixed at a rate lower than the minimum required for subsistence in any region cannot be regarded as arbitrary or capricious.

D. THE ACT IS NOT INVALID BECAUSE OF ITS AGRICULTURAL EXEMPTIONS

Section 13 (a) (6) of the Act exempts from its operation any employee engaged in agriculture. In the court below appellee contended that this ex-

(1938), p. 305 (maximum difference between regions in cost of living, nine percent).

Differences between Communities of Different Sizes.—The above studies also indicate that the difference in cost of living between small and large cities is not very great. United States Department of Labor, Bureau of Labor Statistics (Reprint from *Monthly Labor Review*), Serial No. R 698, p. 7, *Living Costs of Working Women in New York* (small cities slightly higher); United States Department of Labor, Women's Bureau, *State Minimum Wage Budgets for Women Workers Living Alone*, November 1938, p. 11 (in Pennsylvania small cities at most 4.3 percent less, the sole difference being in rent); Works Progress Administration, *op cit.*, *supra*, pp. 170-171; National Industrial Conference Board Bulletin, Vol. XII, No. 10, October 17, 1938 (large cities 6.6 percent higher).

The debates show that this material was familiar to Congress, 81 Cong. Rec. 7793-7795, 7850; 82 Cong. Rec. 1499; 83 Cong. Rec. 7307-7308, 7382-7383, 9171, 9266.

emption made the entire law unconstitutional. This argument rested almost wholly on *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. But Connolly's case, "worn away by the erosion of time," has since been overruled and the general differences between industry and agriculture have been recognized as sufficient to warrant separate legislative classification. *Tigner v. Texas*, 310 U. S. 141, 147.¹⁷ The foundation of appellee's argument has therefore been swept away.

Appellee argued in particular that the arbitrary nature of the exemption was proved by the fact that it excluded from the operation of the statute producers of naval stores.¹⁸ It is alleged that since

¹⁷ See, also, *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 509-513; *Steward Machine Co. v. Davis*, 301 U. S. 548, 583-585; *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S. 285, each of which upheld statutes containing an exemption for agriculture. In *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 58 (C. C. A. 8th), decided June 26, 1940, the court explained the reasons for the exemption of agricultural employees from the Fair Labor Standards Act.

¹⁸ Section 13 (6) exempts "any employee employed in agriculture." Section 3 (f) defines "agriculture" as including the "production * * * of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended)."

Section 15 (g) of the Agricultural Marketing Act, as amended, 46 Stat. 1550, U. S. C., Tit. 12, Sec. 1141j (g), provides that—

"As used in this Act, the term 'agricultural commodity' includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum

the employees of naval stores operators and lumber manufacturers both work on pine trees, it is capricious to exempt one from the Act and not the other.

Inasmuch as appellee has not suggested that the exemption of the employees engaged in drawing gum from pine trees injures him, he is not in a position to complain of it.¹⁹ Moreover, the power of the legislature to regulate one industry and not another has repeatedly been recognized.²⁰

But in any event the hearings before the joint congressional committees on the Fair Labor Standards Act and the debate on the floor of the Senate demonstrate that Congress had before it ample evidence justifying the exemption granted. Several witnesses, including two from the Department of Agriculture, testified that in their opinion the drawing of gum from the living tree and its physical separation in a still into turpentine and rosin by the original producer were agricultural operations.²¹ The statutory exemption applies only to

(oleoresin) from which derived: Gum spirits of turpentine and gum rosin, as defined in section 92 of title 7."

¹⁹ *Heald v. District of Columbia*, 259 U. S. 114, 123; *Car-michael v. Southern Coal & Coke Co.*, 301 U. S. 405, 613; *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 558; *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226, 227.

²⁰ *Soon Hing v. Crowley*, 113 U. S. 703, 708-709; *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 410; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 179.

²¹ See Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th

such operations and not to other production of naval stores.²³ The record before the committees showed that the process had been specially defined as an agricultural activity by the amendment to the Agricultural Marketing Act in 1931, which is incorporated by reference in the Fair Labor Standards Act,²⁴ in the Agricultural Adjustment Act, as amended and administered,²⁵ in the Soil Conservation and Domestic Allotment Act, as administered,²⁶ and in the laws of Georgia, Florida, Mississippi and Alabama, which produce ninety-five percent of the gum naval stores.²⁶ It was not disputed that "the

Cong., 1st Sess., on S. 2475 and H. R. 7200, *Fair Labor Standards Act of 1937*, pp. 1164-1190. See, also, 81 Cong. Rec. 7660.

The operations consist in the main of cutting a mark in the tree, attaching and collecting cups in which the gum gathers, and distilling it into turpentine and rosin by one or two men. Hearings, *supra*, at pp. 1170-1171, 1186-1187.

²² The witness distinguished the production of gum turpentine, described above, from wood turpentine, which is obtained by taking dead wood from the forest to a processing plant for shredding and refining. The latter operation was stated to be industrial and manufacturing. *Id.*, at 1186-1189; see Wage and Hour Interpretative Bulletin No. 14, p. 4.

²³ Hearings, *supra*, note 21 at p. 1165. See note 18, *supra*, p. 114.

²⁴ *Id.*, at pp. 1166-1167. See in particular Section 8 (c) (2) and (6) of the Agricultural Adjustment Act, approved August 24, 1935, 49 Stat. 754-756, U. S. C., Tit. 7, Sec. 608c (2) and (6).

²⁵ *Id.*, at p. 1167.

²⁶ *Id.*, at pp. 1167-1168. The state statutes are there quoted.

sawmill people are probably manufacturers."²⁷ A representative of the lumber industry, appearing before the committees, did not request any general exemption but assumed that the industry was covered by the bill.²⁸

With this testimony before Congress, the exemption of gum turpentine from an act which applies to the lumber industry cannot be deemed arbitrary or capricious in violation of the Fifth Amendment.

E. THE ACT IS NOT INDEFINITE

Appellee has argued that the Fair Labor Standards Act violates the due process clause because of its indefiniteness in defining the persons subjected to its terms. We find it difficult to comprehend this objection.

The Act applies to employees engaged in commerce or in the production of goods for commerce (Sections 6 and 7). "Commerce" is defined as trade, transportation, etc., among the several states or from any state to any place outside thereof, (Section 3 (b)) and "production of goods" is defined, most broadly, as working on goods in any manner (Section 3 (j)). The word "goods" is also defined (Section 3 (i)). Thus one who employs persons working on goods which are sent across state lines would know he was subject to the Act. Certainly no one in the position of appellee

²⁷ *Id.*, at p. 1184.

²⁸ *Id.*, at pp. 963-965 (testimony of Wilson Compton).

could have any doubt as to the applicability of the statute to him:

Of course, borderline cases may probably be found where there might be disagreement as to whether a person fell within the statutory definition. But obviously they do not make a law unconstitutional, or no law could stand. Cf. *Nash v. United States*, 229 U. S. 373.

CONCLUSION

For the above reasons it is respectfully submitted that the Fair Labor Standards Act is valid and that the judgment of the court below should be reversed.

FRANCIS BIDDLE,
Solicitor General.

THURMAN ARNOLD,
Assistant Attorney General.

ROBERT L. STERN,
HUGH B. COX;
WARNER W. GARDNER;
Special Assistants to the Attorney General.

GERARD D. REILLY,
Solicitor,

IRVING J. LEVY,
Assistant Solicitor,

JULIUS SCHLEZINGER,
ERWIN B. ELLMANN,
Attorneys,
Department of Labor.

SEPTEMBER 1940.

APPENDIX A

1. THE FAIR LABOR STANDARDS ACT,

52 Stat. 1060, U. S. C., Title 29, Sec. 201 *et seq.*:

[S. 2475]

AN ACT To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938."

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;

and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming, in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the produc-

tion, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and

promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place,

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not

less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e)¹ No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and

¹ This paragraph added by amendment contained in Sec. 3 of Pub. Res. 88, 76th Cong., 3d Sess., c. 432, approved June 26, 1940.

the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an

hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(5) * if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power, without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate;

* See note 1, *supra*, p. 125.

to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) * The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date.

* See note 1, *supra*, p. 125.

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or

for employment in excess of 56 hours in any work-week, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum

wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the in-

dustry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

- (1) competitive conditions as affected by transportation, living, and production costs;
- (2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and
- (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry com-

mittee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon

the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b). The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or surities satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subect to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited

shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animals and vegetable life, including the going to and return-

ing from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products, or (11)* any switchboard operator employed in a public telephone exchange which has less than five hundred stations.

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of sec-

* This clause added by amendment of August 9, 1939, 53 Stat. 1266.

tion 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of

employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.
Approved, June 25, 1938.

2. THE PERTINENT REGULATIONS

Title 29, Chapter V, Code of Federal Regulations,
Part 516

UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR
DIVISION

Regulations on records to be kept by employers pursuant to Section 11 (c) of the Fair Labor Standards Act of 1938; approved Oct. 21, 1938; published in Fed. Reg. Oct. 22, 1938

SECTION 516.1—RECORDS REQUIRED.—Every employer subject to any provisions of the Fair Labor Standards Act or any order issued under this Act shall make and preserve records containing the following information with respect to each person employed by him, with the exception of those specified in sections 13 (a) (3), 13 (a) (4), 13 (a) (5), 13 (a) (6), 13 (a) (8), 13 (a) (9), and 13 (a) (10) of the Act:

- (a) Name in full.
- (b) Home address.
- (c) Date of birth if under 19.
- (d) Hours worked each workday and each workweek.
- (e) Regular rate of pay and basis upon which wages are paid.

(f) Wages at regular rate of pay for each workweek, excluding extra compensation attributable to the excess of the overtime rate over the regular rate.

(g) Extra wages for each workweek attributable to the excess of the overtime rate over the regular rate.

(h) Additions to cash wages at cost, or deductions from stipulated wages in the amount deducted or at the cost of the item for which deduction is made, whichever is less.

(i) Total wages paid for each workweek.

(j) Date of payment.

Provided; however, That with respect to employees specified in section 13 (b) of the Act, records referred to in paragraphs (f) and (g) of this section shall not be required; and

Provided further, That with respect to employees who are specified in section 13 (a) (2) of the Act and employees who are defined in regulations of the Wage and Hour Division: Part 541 (Regulations defining and delimiting the terms "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman" pursuant to sec. 13 (a) (1) of the Fair Labor Standards Act)—employers need make and preserve records containing the following information only:

- (a) Name in full.
- (b) Home address.
- (c) Occupations.

Provided further, That with respect to employees employed or purported to be employed by

an employer in pursuance of the provisions of section 7 (b) (1) or section 7 (b) (2) of the Fair Labor Standards Act, employers shall comply with each of the following additional requirements:

(a) Keep and preserve a copy of each collective bargaining agreement which entitles or purports to entitle an employer to employ any of his employees in pursuance of the provisions of section 7 (b) (1) or section 7 (b) (2) of the Fair Labor Standards Act.

(b) Report and file with the Administrator at Washington, D. C., within thirty days after such collective bargaining agreement has been made, a copy of each such collective bargaining agreement. Likewise, a copy of each amendment or addition thereto shall be reported and filed with the Administrator at Washington, D. C., within thirty days after such amendment or addition has been agreed upon. If any such collective bargaining agreement, or amendment or addition thereto, was made prior to the 25th day of April 1939, a copy thereof shall be reported and filed with the Administrator at Washington, D. C., on or before the 26th day of May 1939. The reporting and filing of any collective bargaining agreement or amendment or addition thereto shall not be construed to mean that such collective bargaining agreement or amendment or addition thereto is a collective bargaining agreement within the meaning of the provisions of Section 7 (b) (1) or Section 7 (b) (2).

(c) Make and preserve a record designating each employee employed pursuant to each such collective bargaining agreement and each amendment and addition thereto.

Provided further, That with respect to employees employed in occupations in the performance of which the employee receives tips or gratuities from third persons which are accounted for or turned over by the employee to the employer, additional records containing the following information with respect to each such employee shall be made and preserved by the employer:

(a) Total hours worked each workweek in occupations in the performance of which the employee receives tips or gratuities from third persons.

(b) Total hours worked each workweek in any other occupation.

(c) Wages paid each workweek for hours worked under (a) above; *provided, however*, that if the employer claims as "wages paid" the amount of any gratuities or tips voluntarily paid to the employee by third persons and accounted for or turned over by the employee to the employer, such amounts must be recorded in a separate column from that in which any other compensation is recorded.

(d) Wages paid each workweek for hours worked under (b) above; *provided, however*, that if the employer claims as "wages paid" the amount of any gratuities or tips voluntarily paid to the employee by third persons and accounted for or turned over by the employee to the employer, such amounts must be recorded in a separate column from that in which any other compensation is recorded.

(This section, as amended, approved by the Administrator October 13, 1939, and published in the Federal Register October 14, 1939.)

SEC. 516.2.—FORM OF RECORDS.

No particular order or form is prescribed for these records, provided that the information required in section 516.1 is easily obtainable for inspection purposes.

SEC. 516.3.—PLACE AND PERIOD FOR KEEPING RECORDS.

Each employer shall keep the records required by these regulations for his employees within each State either at the place or places of employment or, where that is impracticable, in or about at least one of his places of business within such State, unless otherwise authorized by the Administrator. Such records shall be kept safe and readily accessible for a period of at least 4 years after the entry of the record, and such records shall be open to inspection and transcription by the Administrator or his duly authorized and designated representative at any time.

SECTION 516.4.—DEFINITIONS OF TERMS USED IN THESE REGULATIONS.

(a) *Act*.—The "Act" means the Fair Labor Standards Act of 1938.

(b) *Hours worked*.—For the purpose of these regulations the term "hours worked" shall include all time during which an employee is required by his employer to be on duty or to be on the employer's premises or to be at a prescribed workplace.

(c) *Workday and workweek*.—For the purposes of these regulations, a "workday" with respect to any employee shall be any 24 consecutive hours, and a "workweek" with respect to any employee shall be 7 consecutive days, provided that the workday

of workweek is not changed for the purpose of evasion of provisions of the Act or any regulations prescribed pursuant thereto.

(d) *Wage or wages*.—For the purposes of these regulations, the term “wage” or “wages” means all remuneration for employment of whatsoever nature whether paid on time work, piece work, salary, commission, bonus, or other basis.

(e) *Employee*.—The term “employee” is defined by the Act (sec. 3 (e)) to include “any individual employed by an employer,” and the term “employ” is defined by the Act (sec. 3 (g)) to include “to suffer or permit to work.” It shall be the duty of each employer to make and preserve all records required under these regulations with respect to each employee employed by him, whether or not such employees perform their work in an establishment or plant operated by the employer or subject to his immediate supervision. Thus, the required records shall be made and preserved by the employer for “industrial home workers” or other employees who produce goods for the employer from material furnished by home or who are compensated for such employment at piece rates, wherever such employees actually perform their work.

(f) *Regular rate of pay*.—For the purpose of these regulations, the term “regular rate of pay” means—

(i) With respect to an employee paid solely on an hourly basis (i. e., receiving no additional wage whatever): the hourly wage rate at which he is employed.

(ii) With respect to an employee employed on a daily, weekly, semimonthly, or monthly basis for a regular number of hours

per week determined by agreement or custom: the average hourly rate obtained by dividing the wages earned for that regular number of hours in the workweek by that regular number of hours; and

(iii) With respect to an employee paid on any other basis than those specified in (i) and (ii) of this Paragraph (f): the average hourly rate obtained by dividing the wages earned for the particular workweek by the total number of hours worked during that workweek.

SECTION 516.5.—PETITION FOR AMENDMENT OF REGULATION.

Any person wishing a revision of any of the terms of the foregoing regulations on records to be kept by employers (secs. 516.1 through 516.4) may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provisions for affording interested parties an opportunity to present their views, both in support and in opposition to the proposed changes.

APPENDIX B

TABLE 1.—Major causes of strikes, 1881-1905; 1914-1936, and annually 1937 to 1938¹

Year or period	Number of strikes ²				Percent of total		
	Strikes in which wages or hours were an issue				Strikes in which wages or hours were an issue		
	Total strikes	Wages or hours the sole issue	Wages and hours combined with other issues, including recognition	Total strikes in which wages or hours were an issue	Strikes in which wages or hours were not an issue ³ (includes recognition and other issues)	Wages or hours the sole issue	Wages and hours combined with other issues, including recognition
1881-1905.....	35,303	20,660	1,527	22,187	16,110	54.00	4.00
1914-1923.....	20,338	14,545	2,462	17,007	9,351	53.12	9.44
1927.....	666	273	38	311	355	40.99	5.71
1928.....	620	222	48	270	350	38.81	7.74
1929.....	924	373	95	468	456	40.37	10.28
1930.....	651	284	86	320	331	43.63	5.59
1931.....	796	447	53	500	296	56.16	6.96
1932.....	863	560	60	610	242	65.78	5.87
1933.....	1,473	926	227	1,153	519	55.38	13.58

¹ U. S. Department of Labor, Bureau of Labor Statistics, *Strikes in the United States, 1880-1936*. Bulletin No. 681 (1937). Computed from table 8, p. 53 and table 26, pp. 61-62.

² Includes both strikes and lockouts.

³ Includes only strikes the major causes of which were classified as "wages and hours."

⁴ Includes only strikes the major causes of which were classified as "recognition and wages," "recognition and hours," and "recognition, wages, and hours."

⁵ Includes only strikes the major causes of which were classified as "recognition," "closed shop," "discrimination," "other organization issues," "sympathy," "rival unions or factions," "jurisdiction," "other," and "not reported."

TABLE 1.—Major causes of strikes, 1881-1905; 1914-1926, and annually 1927 to 1939—Continued

Year or period	Number of strikes				Percent of total			
	Strikes in which wages or hours were an issue		Strikes in which wages or hours were not an issue (includes recognition and other issues)		Strikes in which wages or hours were an issue		Strikes in which wages or hours were not an issue (includes recognition and other issues)	
	Total strikes	Wages or hours the sole issue	Wages and hours combined with other issues, including recognition	Total strikes in which wages or hours were an issue	Wages or hours the sole issue	Wages and hours combined with other issues, including recognition	Total strikes in which wages or hours were an issue	Strikes in which wages or hours were not an issue (includes recognition and other issues)
1904.....	1,817	717	326	1,045	38.46	17.94	37.40	42.80
1905.....	2,008	790	360	1,139	37.94	18.42	36.35	43.64
1906.....	2,166	766	603	1,392	35.06	30.80	34.86	35.44
1907.....	4,720	1,410	1,747	3,147	30.87	37.01	33.83	33.12
1908.....	2,772	776	990	1,366	28.00	21.28	40.30	50.77
1st six months of 1909.....	1,120	314	228	228	28.03	19.10	47.14	52.85
1927-1929.....	30,708	7,818	4,439	12,247	37.64	21.32	56.96	41.03
Total, 1881-1939.....	83,460	43,023	8,448	51,471	50.34	9.88	60.23	36.77

* U. S. Department of Labor, Bureau of Labor Statistics, *Analysis of Strikes in 1937* (1938). Computed from table 10, p. 15.† U. S. Department of Labor, *Monthly Labor Review*, May 1939, p. 1123.‡ U. S. Department of Labor, *Monthly Labor Review*, May 1933, p. 1138; June 1933, p. 1344; July 1933, p. 156; August 1933, p. 305; September 1933, p. 637; October 1933, p. 902.

TABLE 2.—Number of workers involved in strikes, 1881-1905, and annually 1907 to 1939¹

Year or period	Number of workers involved ²					Percent of total		
	Strikes in which wages or hours were an issue					Strikes in which wages or hours were an issue		
	Strikes in which wages or hours were not an issue ³					Strikes in which wages or hours were not an issue ³		
	Total number of workers involved	Wages or hours the sole issue ⁴	Wages and hours combined with other issues, including recognition ⁵	Total strikes in which wages or hours were an issue	Strikes in which wages or hours were not an issue ³ (includes recognition and other issues)	Wages or hours the sole issue ⁴	Wages and hours combined with other issues, including recognition ⁵	Total strikes in which wages or hours were an issue
1881-1905	9,526,634	5,901,309	354,544	6,755,943	2,773,491	61.92	8.97	70.90
1907	319,442	225,217	12,020	244,837	74,005	72.60	3.95	76.65
1908	322,866	198,913	29,306	169,119	153,747	43.33	9.05	52.38
1909	286,163	104,050	33,945	138,004	128,159	36.36	18.55	55.21
1910	181,001	73,223	47,029	121,152	60,769	40.25	25.35	65.60
1911	346,090	165,308	60,217	215,525	130,144	44.93	17.42	62.35
1912	334,000	224,158	64,945	290,003	25,997	72.06	19.95	92.01
1913	1,143,910	644,084	267,832	811,446	332,464	47.57	25.37	70.94
1914	1,480,343	846,174	589,917	936,091	544,232	33.38	19.85	53.23
1915	1,101,922	692,539	164,172	858,711	275,191	60.13	14.50	74.63
1916	706,748	280,672	224,098	478,338	224,410	33.32	31.04	64.97
1917 ⁶	1,945,748	435,568	590,086	1,025,654	920,094	22.30	30.83	53.73

¹ U. S. Department of Labor, Bureau of Labor Statistics, *Strikes in the United States, 1880-1936*, Bulletin No. 651, 1937. Computed from table 9, p. 54 and table 21, p. 62.² No figures are available for the period 1914-1929.³ Includes only strikes the major causes of which were classified as "wages and hours."⁴ Includes only strikes the major causes of which were classified as "recognition and wages," "recognition and hours," and "recognition, wages and hours."⁵ Includes only strikes the major causes of which were classified as "recognition," "closed shop," "discrimination," "other organization issues," "sympathy," "rival unions or factions," "jurisdiction," "other," and "not reported."⁶ U. S. Department of Labor, Bureau of Labor Statistics, *Analysis of Strikes in 1917, 1918*, Computed from table 10, p. 15.

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.

FILED

DEC 2 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA,
Appellant,

v.

FRED W. DARBY,
Appellee.

No. 82

Appeal from the District Court of the United States
for the Southern District of Georgia

BRIEF FOR APPELLEE

ARCHIBALD B. LOVETT,
R. BASIL MORRIS,
ROBERT M. HITCH, JR.,
MALBERRY SMITH, JR.,
Attorneys for Appellee.

17 Drayton Street,
Savannah, Georgia.

BLANK PAGE

CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
STATEMENT	2
ARGUMENT	3

- I. The Fair Labor Standards Act of 1938 is an unconstitutional attempt to regulate conditions in production of goods and commodities, and it can not be sustained as a regulation of interstate commerce within the delegated power of the Congress under the commerce clause. It violates the Tenth Amendment..... 3
 - (a) Introduction 3
 - (b) The origin of the commerce clause, the nature of our constitutional system, and the course of judicial decisions do not support the construction urged by appellant..... 5
 - (c) The decisions of this Court establish that manufacture and production are not ordinarily subjects of interstate commerce, and, therefore, generally are not within the regulatory control of Congress 15
 - (d) The legislative findings of fact contained in Section 2(a) of the Act are an attempt to create powers which were not granted or delegated to Congress under the commerce clause of the Constitution..... 22
 - (e) Section 15(a) (1) is an unconstitutional exercise of the power under the commerce clause in attempting to

CONTENTS—(Continued)

	Page
control the evil aimed at in Section 2(a) (1) of the Act.....	29
(1) The holding in the Convict Labor case is not controlling in this case.....	31
(2) A prohibition of shipments in interstate commerce, except under specified conditions, is not necessarily a permissible exercise of the Congressional power.....	34
(3) The respective governmental interests of the National Government and of the several states in commerce in useful and harmless commodities differ in character from their respective interests in commerce in harmful and deleterious articles.....	38
(4) The power of Congress is restricted to commerce among the several states, and the validity of an exercise of this power is not primarily determined by its tendency to promote the general welfare.....	41
(5) The necessary effect of Section 15(a) (1) is to regulate directly conditions of production.....	43
(6) The ruling in <i>Hammer v. Dagenhart</i> is not inconsistent with the distribution of powers provided in the Constitution.....	46
(f) Section 15(a) (2) is an unconstitutional exercise of the power under	

CONTENTS—(Continued)

	Page
the commerce clause in attempting to control the evil aimed at in Section 2(a) (1) of the Act.....	47
(1) The asserted necessity for uniform regulation of wages and hours can not bring these subjects within the purview of the Federal commerce power	48
(2) The statutes and cases cited by appellant are not controlling upon the circumstances of this case.....	51
(3) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not affect interstate commerce in such manner as to be subject to the regulatory power of Congress	53
(4) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not constitute such an unfair method of competition as to be subject to the regulatory power of Congress	63
(5) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not lead to labor disputes which burden	

CONTENTS—(Continued)

	Page
and obstruct commerce and the free flow of goods in commerce so as to be subject to the regulatory power of Congress	75
(6) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not interfere with the orderly and fair marketing of goods in commerce so as to be subject to the regulatory power of Congress	79
II. The Fair Labor Standards Act of 1938 is an unconstitutional attempt to deprive appellee of his liberty and property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.....	85
(a) Introduction	85
(b) The Wage and Hour Act is a deprivation of the freedom of contract guaranteed to appellee by the Fifth Amendment and is, therefore, violative of the due process clause.....	87
(c) The Wage and Hour Act is violative of the due process clause because it is arbitrary and capricious.....	90
(d) The Wage and Hour Act is violative of the due process clause by reason of its indefiniteness in defining the persons subject to its penal provisions.....	96
III. Conclusion	100

v.

AUTHORITIES

Table of Cases

	Page
Adkins v. Children's Hospital, 261 U. S. 525.....	86
Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission, 291 U. S. 587.....	63
Asbell v. Kansas, 209 U. S. 251.....	40
Bailey v. Drexel, 259 U. S. 20.....	37
Brooks v. United States, 267 U. S. 432.....	32
Brown v. Maryland, 12 Wheat. 419.....	44
Bunting v. Oregon, 243 U. S. 426.....	86, 87
Carter v. Carter Coal Co., 253 U. S. 238.....	8, 10, 17, 18, 26, 29, 45, 48, 49, 50, 51, 52, 54, 62, 65, 67, 71, 78, 103
Champion v. Ames, 188 U. S. 321.....	31
Chicago Board of Trade v. Olsen, 262 U. S. 1.....	27, 28, 61, 73
Clark v. Paul Gray, Inc., 306 U. S. 583.....	25
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197.....	60, 63
Coronado Coal Co. v. United Mine Workers, 268 U. S. 295.....	22, 54
Crowell v. Benson, 285 U. S. 22.....	24
Currin v. Wallace, 306 U. S. 1.....	16, 19, 20, 72, 73, 79, 87
Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67.....	63
Federal Trade Commission v. Civil Service Training Bureau, Inc., 79 F. (2d) 113.....	63
Federal Trade Commission v. Keppel, 291 U. S. 304.....	63
Federal Trade Commission v. Raladam Co., 283 U. S. 643.....	70

AUTHORITIES—(Continued)

	Page
Federal Trade Commission v. Western Meat Co., 272 U. S. 554.....	63
Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483.....	63
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1.....	40
Fox Film Corp. v. Federal Trade Commission, 296 Fed. 353.....	63
Geer v. Connecticut, 161 U. S. 519.....	40
Gibbons v. Ogden, 9 Wheat. 1.....	42
Gooch v. United States, 297 U. S. 124.....	32
Hammer v. Dagenhart, 247 U. S. 251.....	35, 36, 37, 43, 46, 47, 54, 101
Heisler v. Thomas Colliery Co., 260 U. S. 245.....	21, 54
Helvering v. Hallock, 309 U. S. 106.....	62
Hipolite Egg Co. v. United States, 220 U. S. 45.....	31
Hoke v. United States, 227 U. S. 308.....	32
Holden v. Hardy, 169 U. S. 366.....	87
International Shoe Co. v. Federal Trade Commission, 280 U. S. 291.....	63
Kansas v. Colorado, 206 U. S. 46.....	47
Kentucky Whip & Collar Co. v. I. C. R. Co., 299 U. S. 334.....	31, 32, 33, 46, 73, 74, 102
Kidd v. Pearson, 128 U. S. 1.....	54, 68
Knoxville Iron Co. v. Harbison, 183 U. S. 13.....	87
Lemke y. Farmers Grain Co., 258 U. S. 50.....	73
License Cases, 5 How. 504.....	44
Morehead v. New York ex rel. Tipaldo, 298 U. S. 587.....	89
Mulford v. Smith, 307 U. S. 38.....	16, 19, 20, 43, 61, 73, 79
National Labor Relations Board v. Bradford Dyeing Ass'n., No. 588, October Term, 1939.....	53

AUTHORITIES—(Continued)

	Page
National Labor Relations Board v. Fainblatt, 306 U. S. 601.....	57, 58
National Labor Relations Board v. Friedman- Harry Marks Clothing Co., 301 U. S. 58.....	36
National Labor Relations Board v. Fruehauf Co., 301 U. S. 49.....	36
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1.....	14, 19, 25, 36, 37, 54, 55, 57, 61, 62, 78
New State Ice Co. v. Liebmann, 285 U. S. 262.....	34
Northern Securities Co. v. United States, 193 U. S. 197.....	63
Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229.....	40
Oliver Iron Co. v. Lord, 262 U. S. 172.....	54
Parrish v. West Coast Hotel Co., 185 Wash. 581, 55 P. (2d) 1083.....	86
Patterson v. Bark Eudora, 190 U. S. 169.....	87
Pennsylvania v. West Virginia, 262 U. S. 553.....	40
Rasmussen v. Idaho, 181 U. S. 198.....	40
Rupert v. United States, 181 Fed. 87.....	31
Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453.....	58, 59, 62
Schechter v. United States, 295 U. S. 495.....	13, 25, 29, 45, 48, 49, 51, 52, 64, 65, 66, 67, 70, 77, 78
Sligh v. Kirkwood, 237 U. S. 52.....	40
Smith v. Cahoon, 283 U. S. 553.....	97
Smith v. St. L. & S. W. Rwy. Co., 181 U. S. 248.....	40
South Carolina Highway Dept. v. Barnwell, 303 U. S. 177.....	25
Stafford v. Wallace, 258 U. S. 495.....	27, 28, 51, 61, 73
Sunshine Anthracite Coal Co. v. Adkins, No. 804, October Term, 1939, 84 L. ed. 825.....	62
Swift & Co. v. United States, 196 U. S. 375.....	28

AUTHORITIES—(Continued)

	Page
Texas v. White, 7 Wall. 700.....	12
Townsend v. Yeomans, 301 U. S. 441.....	16, 20
United Mine Works v. Coronado Coal Co., 259 U. S. 344.....	17, 21, 22, 54
United States v. Butler, 297 U. S. 1.....	8, 29, 35, 49
United States v. Carolene Products Co., 304 U. S. 144.....	23, 24, 25
United States v. Cohen Grocery Co., 255 U. S. 81.....	103
United States v. Darby, 32 F. Supp. 734.....	1
United States v. E. C. Knight Co., 156 U. S. 1.....	19, 54
United States v. Popper, 98 Fed. 423.....	31
United States v. Rock Royal Co-operative, Inc., 307 U. S. 533.....	19, 72, 79
West Coast Hotel Co. v. Parrish, 300 U. S. 379.....	62, 86, 88, 89, 90, 92, 103
Whitney v. California, 274 U. S. 357.....	27
Wilson v. New, 243 U. S. 332.....	80, 82, 88

Statutes

Adamson Act, Act of September 3, 5, 1916, 39 Stat. 721.....	80
Agricultural Adjustment Act of 1938, 52 Stat. 31, U. S. C., Title 7, §§1811, et seq.....	16
Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246.....	19, 72
Ashurst-Sumners Act, 49 Stat. 494, U. S. C., Title 49, §§61, et seq.....	32
Child Labor Act, Act of September 1, 1916, 39 Stat. 675.....	35, 36, 37
Child Labor Tax Act, Act of February 24, 1919, 40 Stat. 1057, 1138.....	37
Criminal Appeals Act, U. S. C., Title 18, §682.....	2

AUTHORITIES—(Continued)**Page**

Fair Labor Standards Act of 1938, 52 Stat. 1060	
U. S. C., Title 29, §§201, et seq.....1, 2, 3, 4, 5, 26, 29,	
30, 31, 34, 37, 41, 43, 44, 45, 47, 48, 49,	
52, 53, 54, 55, 56, 61, 63, 65, 68, 73, 74,	
76, 77, 79, 82, 83, 84, 85, 86, 87, 88, 90,	
91, 92, 93, 96, 97, 100, 101, 102, 103, 104	
Federal Trade Commission Act, 38 Stat. 717.....	69
Food and Drugs Act, 34 Stat. 768, U. S. C.,	
Title 21, §2.....	51
Judicial Code, §238, U. S. C., Title 28, §345.....	2
Meat Inspection Act, 34 Stat. 1260, U. S. C.,	
Title 21, §78.....	51, 61
National Industrial Recovery Act, 48 Stat. 195.....	70, 78
National Labor Relations Act,	
49 Stat. 449.....54, 55, 57, 58, 59, 76, 77, 78, 100	
Sherman Act, 26 Stat. 209.....	69

Secondary Authorities

Brief for the United States.....5, 6, 8, 9, 10, 27, 28, 32, 35,	
38, 39, 45, 46, 51, 61, 69, 74, 75, 86	
Brief for the United States in <i>Schechter v. United</i>	
States, Nos. 854 and 864, October Term, 1934.....	43
36 Columbia Law Review 283.....	24
Farrand, <i>The Framing of the</i>	
Constitution (1913).....	6, 7, 10, 11
Frankfurter, <i>The Commerce Clause Under</i>	
Marshall, Taney and Waite (1937).....	14
House Report No. 2182, 75th Cong., 3d Sess.....	92, 95, 98, 99
Madison's Debates in the Federal Convention of	
1787 (International Ed., 1920).....	6, 7, 8
Ribble, <i>National and State Cooperation Under the</i>	
Commerce Clause; 37 Columbia Law Review 43.....	14
Wage and Hour Interpretative Bulletin No. 5,	
December 2, 1938.....	84

BLANK PAGE

IN THE
Supreme Court of the United States
OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA,
Appellant,

v.

FRED W. DARBY,
Appellee.

No. 82

Appeal from the District Court of the United States
for the Southern District of Georgia

BRIEF FOR APPELLEE

Appellee, operating a local sawmill in the State of Georgia, under the trade name of F. W. Darby Lumber Company, was indicted for alleged violations of the *Fair Labor Standards Act of 1938* (52 Stat. 1060, U. S. C., Title 29, §§201, *et seq.*). A demurrer and motion to quash the indictment on constitutional grounds having been sustained in the District Court, the Government has taken this appeal direct to this Court.

The constitutional questions raised by the demurrer, and now insisted upon, relate to the power of Congress

under the commerce clause to enact the legislation so as to bring the activities of the appellee under the terms of the Act, and also involve the Fifth and Tenth Amendments.

Opinion Below.

The opinion of the Court below, (R. 16), is reported in 32 F. Supp. 734:

Jurisdiction.

The judgment below was entered May 6, 1940, (R. 21). The order allowing appeal was filed May 13, 1940, (R. 22), and probable jurisdiction noted June 3, 1940. The jurisdiction of this Court is based upon the Criminal Appeals Act (U. S. C., Title 18, §682) and §238 of the Judicial Code as amended (U. S. C., Title 28, §345).

Statement.

The statement of the case in the brief of the Government is correct and no additional statement need be made by appellee.

The fundamental and basic issues in the case at bar are, first, the sufficiency of the indictment in bringing the activities of appellee within the operative sphere of the *Fair Labor Standards Act of 1938*, and, secondly, the constitutionality of the statute if his activities are regulated thereby. The determinative allegations of the indictment insofar as they bear upon appellee's relation to interstate commerce read: "A

large proportion of the lumber bought, procured, obtained, produced, and manufactured by the defendant was bought, procured, obtained, produced, and manufactured by him pursuant to orders received by the defendant from customers without the State of Georgia. The said lumber was bought, procured, obtained, produced, and manufactured with the intent on the part of the defendant that the said lumber after having been bought, procured, obtained, produced, and manufactured would be sold, shipped, transported, and delivered to and the said lumber was sold, shipped, transported, and delivered to customers without the State of Georgia." (R. 2)

The provisions of the statute (52 Stat. 1060, U. S. C., Title 29, §§201, *et seq.*) are set out in full in Appendix A of the brief of the Government.

ARGUMENT

I.

The Fair Labor Standards Act of 1938 is an unconstitutional attempt to regulate conditions in production of goods and commodities, and it can not be sustained as a regulation of interstate commerce within the delegated power of the Congress under the commerce clause. It violates the Tenth Amendment.

(a) Introduction.

The Act represents an undisguised attempt on the part of the Federal Government to establish minimum wages and maximum hours throughout the industries

of the entire nation. Its scope is unparalleled,¹ and its pattern has no exact precedent in legislative history. It embraces within its humanitarian aims the establishment of a single nation-wide standard of working conditions, the prevention of unfair competition from employers who have manufactured low-cost goods with low-cost labor, and the general promotion of economic stability by an increase in purchasing power.

The generating power to enact this legislation is sought in the commerce clause of the Constitution of the United States.

Following the recently developed technique, Congress has attempted to bolster the exercise of the power by specific legislative findings. Section 2 of the Act enumerates these findings in detail. The declared evil aimed at by the statute is the existence of detrimental labor conditions in industries engaged in commerce or in the production of goods for commerce. The

1. The extent of the applicability of the Act is indicated by the following definitions in §3:

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." [italics supplied]

results flowing from this condition are defined in five conclusions. First, Congress finds that commerce and its channels are being used to spread these conditions; secondly, it contends that commerce is being burdened; thirdly, it maintains that unfair competition results therefrom; fourthly, labor disputes are said to arise from the condition; and lastly, it is found that detrimental labor conditions prevent the fair and orderly marketing of goods in commerce.²

(b) The origin of the commerce clause, the nature of our constitutional system, and the course of judicial decisions do not support the construction urged by appellant.

The historical background and origin of the commerce clause and the development of constitutional doctrine under it have been discussed at considerable length in the brief of the Government. Although the Government's discussion of the proceedings of the Constitutional Convention of 1787 are, in the main, thorough and correct, the accompanying analysis con-

2. "Findings and Declaration of Policy

"Sec. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

tains misleading implications and is likely to leave erroneous impressions in its wake. The statement in the final sentence on page 44 of the Government's brief, following as it does the contrast in the statement of legislative powers in the resolutions of Randolph and of Patterson, implies that the New Jersey Plan was rejected because of the discrepancies between its provision for a Federal power over matters of trade and commerce and the broad provisions for legislative powers in the Virginia Plan. We submit that the conclusion is without substantial support.

Constitutional historians have written at great length on the proceedings of the Constitutional Convention of 1787. Their research and consideration of the available source materials indicate that more general objections led to the ultimate rejection of the New Jersey Plan. It³ sought to establish a Federal system patterned after the Articles of Confederation.⁴ In contrast, the Virginia Plan⁵ had as its basic design a National Government, supreme in its sphere and free from domination or control on the part of the states. The New Jersey Plan⁶ was proposed by the delegates representing the smaller states who were dissatisfied and alarmed by the provisions for Congressional representation in the Virginia Plan. They strenuously

3. *Madison's Debates in the Federal Convention of 1787* (International Ed., 1920), 102 [notes on session of Friday, June 15, 1787].

4. *Id.*, at xxxvii.

5. *Id.*, at 23 [notes on session of Tuesday, May 29, 1787]; *id.*, at 99 [notes on session of Wednesday, June 13, 1787].

6. *Farrand, The Framing of the Constitution* (1913), 84, et seq.

fought for an effective check upon the legislative powers of the Federal Government through the requirement that a certain number of states should concur before the legislative powers of the Federal Government could be operative. There was a general willingness, because of the obvious weaknesses in the Articles of Confederation, to grant extensive powers to the Federal Government, but specific delimitations of such powers were clearly in the minds of the delegates in the adoption of the final broad standard.⁷ The recent unhappy experience of the country under the Articles had made obvious many specific defects in the plan of government therein provided.⁸ The delegates were well aware of the lack of cohesion and authority in the original plan of confederation. Though believing that their plan of government would probably endure for future generations, they nevertheless confined their proposals in large part to the removal of the demonstrated defects of the Confederation. Even Randolph, who proposed the resolutions which became known as the "Virginia Plan," which contained the broad provision for legislative powers, "disclaimed any intention to give indefinite powers to the national Legislature, declaring that he was entirely opposed to such an inroad on the State jurisdictions, and that he did not think any considerations whatever could ever change his determination."⁹ All of the

7. *Id.*, at 77.

8. *Id.*, at 42, *et seq.*

9. Madison's *Debates*, 36 [notes on session of Thursday, May 31, 1787].

available facts indicate that the broad standard prescribed for the drafting of specific legislative powers in the National Government was unobjectionable to and was accepted by the members of the Convention because, and only because, they had in mind possible cures for the specific defects which had come to light under the system of the Confederation. It was no surprise, therefore, that the committee of detail specifically defined the separate legislative powers in its draft of the Constitution.¹⁰ The committee simply put in concrete form the previous tacit understanding of the delegates.

Basically, the argument of the Government would seek the establishment of an unrestricted power in the Federal Congress, in addition to the enumerated powers, to legislate for the general welfare. Despite its expressed disclaimer,¹¹ such is the practical effect of the argument. The existence of such a power has never been conceded and has been expressly denied in numerous cases.¹² We accept the Government's suggestion¹³ that the enumerated powers should be construed in the spirit in which they were written, but we are in entire disagreement with the implications which it has drawn from the precise wording of the sixth resolution of Randolph.

10. *Id.*, at 340-342 [notes on session of Monday, August 6, 1787].

11. Brief for the United States, at 49.

12. Cf. *United States v. Butler*, 297 U. S. 1, 64, *et seq.*; *Carter v. Carter Coal Co.*, 298 U. S. 238, 291, *et seq.*

13. Brief for the United States, at 49.

The mere words in the grant of power to Congress over commerce with foreign nations and among the several states are not self-definitive or self-executing, and do not provide an exact standard for determining their application in specific cases. Constant judicial interpretation has been required to give the words full meaning and to provide a pragmatic standard for their operation. The impact of experience, and the decisions of this Court, have convincingly justified the original grant of power over interstate commerce to the Federal Congress. The ineffectual control of the states was clearly demonstrable in this operative sphere. The inference which the Government now seeks to establish is that inadequacies in state control breed Federal power to legislate in all commercial matters. The decisions of this Court repudiate such doctrine. The Federal power is limited to "commerce with foreign nations, and among the several states."

The statements which the Government quotes from the proceedings of the state conventions called for the ratification of the Constitution¹⁴ are general statements which apply to the constitutional plan as a whole. They have no direct application to any particular powers. With respect to the work of the Convention and the plan of government established by the Constitution, it has been well-stated:

"The specific task which the convention * * * had before it was to remedy a series of perfectly

14. *Id.*, at 47-48.

definite defects, each of which had revealed itself in the experience of little more than ten years. It was a time when men indulged in philosophical speculation and in political theorizing, but farmers and traders are practical people, and the compelling characteristic of the framers of the constitution was hard-headed common sense. While several of the delegates in preparation for their task read quite extensively in history and government, when it came to the concrete problems before them they seldom, if ever, went outside of their own experience and observation. * * * The constitution was a practical piece of work for very practical purposes. It was designed to meet specific needs."¹⁵

The Government finds that the "incomplete narration [of the history of the proceedings of the Convention in *Carter v. Carter Coal Company*, 298 U. S. 238, 291-292] leaves a wholly incorrect impression."¹⁶ The same comment might be made of the analysis of the Government. We respectfully submit that the broad standard for legislative powers established in the resolution of the Constitutional Convention must be viewed in retrospect to the specific defects of the Confederation. The enumerated powers in the final draft of the Constitution do not lose their relationship to the specific problems which were primarily responsible for the calling of the Convention because of the broad statement in the resolution as adopted. More-

15. Farrand, *op. cit. supra* note 6, at 52, 201.

16. Brief for the United States, at 46-47, note 14.

over, the projection of the terms of a single power against the general standard is misleading in view of the diversity of powers delegated in the same Article. It should be remembered that difficulties in commercial matters were not the sole concern in the calling of the Convention,¹⁷ so that nothing short of the complete congeries of powers conferred is a true measure of the standard prescribed.

It has already been observed that the words of the Constitution delegating power to Congress over interstate commerce are not self-executing, but require a judicial "gloss" for their understanding. Indispensable aid to their construction comes with a full consideration of the contemplated form of government. The sovereignty and individual identity of the several states were to be preserved. The grant of powers to the Federal Government was to be supplemental and not destructive. Aside from the general plan of the Constitution, the Tenth Amendment expressly safeguards the sovereignty of the states except as this sovereignty might be lessened by the powers delegated to the Federal Government. This Court, speaking through Chief Justice Chase, has said of the Union established by the Constitution:

"* * * The perpetuity and indissolubility of the Union, by no means implies the loss of the distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty,

¹⁷ Farrand, *op. cit. supra* note 6, at 42, *et seq.*

freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were, much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the states respectively, or to the people. * * * Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.*" [italics supplied] *Texas v. White*, 7 Wall. 700, 725.

Our government of dual and independent sovereignties involves a delicate balance of powers. Constant repetition has not dulled the sharp significance of the truism that all of the powers of the National Government are dependent upon express delegation by the people, and that the powers of the Federal and State Governments respectively are mutually exclusive.¹⁸ Based as it was upon compromises of political theory

18. No citation of authority is necessary to sustain the proposition that, if the *Wage and Hour Act* can not be sustained under the commerce clause, it is violative of the Tenth Amendment. The power of the National Government over interstate commerce and the powers reserved to the states by the Tenth Amendment are mutually exclusive and, if the exercise of a legislative power lies within the

and upon adjustments of conflicting social and economic interests, the Constitution defies logical analysis. It has been said of the doctrine of constitutional law which uses the appropriate sphere of the states as a measure for, or as a limitation upon, the Federal power over commerce:

"Logicians may cry aloud at this act of judicial exegesis. The central government has those powers which are granted to it. The states have what is left. Thus it may be argued that it is perfectly clear what is left can not be used to limit what is granted. Actually the judicial process has not been this arithmetical one of minuend, subtrahend and remainder. Rather the process has been one of an effort at wise division between governmental agencies. In such a division the capabilities and needs of both may be and are considered. The division may, of course, develop formulas such as that 'production is not commerce,' but these should not conceal the initial fact of division.

"The arithmetical process will not work because the subtrahend is not a known quantity. The federal power over commerce has no such 'definiteness of contour,' and admits of no such precision of measurement as is required for a problem in subtraction. The division is thus one involving a

circle of the one, it falls without the orbit of the other. "Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—the powers not delegated to the United States by the constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Schechter v. United States*, 295 U. S. 495, 528-529.

practical adjustment, and this necessitates a consideration of the needs of the parties to the adjustment."¹⁹

Mr. Justice Frankfurter has voiced his recognition of the logical difficulties in the application of the commerce clause to specific cases in thus clearly stating the nature of the judicial problem presented:

"* * * interstate commerce is a web of state and interstate activities, but not a seamless web. The coexistence of the reserved powers of the states and the commerce power of the nation implies recognition of legal disparateness even where logical unity can be established."²⁰

This Court, speaking through the Chief Justice, had occasion recently to reiterate the limitations imposed upon the Federal power over interstate commerce in the area reserved to the state powers:

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37.

19. Ribble, *National and State Cooperation Under the Commerce Clause*, 37 Columbia Law Review 43, 47-48.

20. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (1937), 97.

(c) The decisions of this Court establish that manufacture and production are not ordinarily subjects of interstate commerce, and, therefore, generally are not within the regulatory control of Congress.

A general outline of the course of judicial decisions under the commerce clause will be illustrative of the extent of the Federal power. Since any commercial practice affecting in any way interstate commerce usually must have a situs within the territorial limits of some state, litigation under the commerce clause, whether involving an exercise of Federal or state power, has always been concerned with intra-state activities. In each instance, the factors of local and extra-state or national importance have been carefully weighed and a pragmatic determination has been reached which preserves with scrupulous regard the respective state and national interests.

Although the powers of the National and State Governments are clearly separate and distinct under the Constitution, a particular matter may fall within the regulatory powers of both the National and State Governments. On the one hand, the National Government may regulate such matters because of the relation to interstate commerce, and, on the other, a state may regulate in view of the relation to its internal affairs. And it is firmly established constitutional doctrine that, where identical matters are regulated by both the Federal and State Governments, each acting within its constitutional sphere, the exercise of the power of the

former is supreme. Expediency requires that a state must yield to the national policy when a conflict occurs. A recent group of cases illustrates the principle. In *Townsend v. Yeomans*, 301 U. S. 441, the power of the State of Georgia to regulate the rates to be charged by tobacco warehousemen for their services in selling tobacco was sustained. The matter regulated had such relation to the public welfare of the state as to justify its control. Indicative of the Federal power over related activities are the cases of *Curran v. Wallace*, 306 U. S. 1, and *Mulford v. Smith*, 307 U. S. 38. *In solido*, these cases illustrate that matters incidental to the orderly marketing of tobacco may be so closely related to the production of tobacco, on the one hand, as to be susceptible to regulation by the several states, and, on the other hand, the relation to interstate commerce may be so direct as to bring such matters within the power over interstate commerce exercised by the National Government. Of course, the particular matters regulated in the *Townsend*, *Curran* and *Mulford* cases²¹ were not identical, but each had as its ultimate aim the orderly marketing of tobacco.

For more than fifty years it was categorically held that manufacturing, mining, agriculture and the like were purely intrastate activities and were subject to

21. *Townsend v. Yeomans*, 301 U. S. 441—regulation of rates charged by tobacco warehousemen under state legislation held constitutional; *Curran v. Wallace*, 306 U. S. 1—compulsory grading of tobacco in warehouses under Federal legislation held constitutional; *Mulford v. Smith*, 307 U. S. 38—quota system with penalty on excess growth under *Agricultural Adjustment Act of 1938*, (52 Stat. 31, U. S. C., Title 7, §§1311, *et seq.*), held constitutional.

the exclusive control of the states under their police powers. A quotation from a decision of this Court expresses admirably the consistent feeling of this tribunal at that time with respect to the proposition stated:

"Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer v. Dagenhart*, 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce." *United Mine Workers of America, et al. v. Coronado Coal Co., et al.*, 259 U. S. 344, 407-8.

The doctrine has been most recently reaffirmed in the *Carter Coal Company* case. The Court stated the following in its opinion in that case:

"That commodities produced or manufactured within a state are intended to be sold or transported outside the State does not render their production or manufacture subject to federal regulation under the commerce clause. * * * One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two

distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships or contracts to sell and ship the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect to the latter, to regulation only by the federal government. *Utah Power & L. Co. v. Pfof*, 286 U. S. 165, 182. *Production is not commerce; but a step in preparation for commerce. Chassaniol v. Greenwood*, 291 U. S. 584, 587." [italics supplied] 298 U. S. 238, 301, 303.

A sale is one of the most customary and usual steps in commercial transactions, and it has uniformly been held that "interstate commerce" comprehends the sale of goods destined for interstate shipment. Thus Congress, under the commerce clause, has the power to regulate sales if they relate to interstate commerce. A statement of the Court demonstrates the rationale of its position:

"The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufac-

tured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

United States v. E. C. Knight Co., 156 U. S. 1, 13.

It is not surprising, therefore, in view of these precedents, that the Court sustained the tobacco-inspection and marketing-quota acts in *Curran v. Wallace*, *supra*, and *Mulford v. Smith*, *supra*, and the *Agricultural Marketing Agreement Act* in *United States v. Rock Royal Co-operative*, 307 U. S. 533. The conditions and activities regulated were recurrent in the process of sale of tobacco and milk for interstate shipment and did not relate directly to manufacture or production. The Court has always upheld a clear distinction between recurring activities, intimately and directly associated with sales in interstate commerce, and conditions in the actual production of goods for interstate distribution.

It has never been held that Congress may regulate indiscriminately and directly the conditions of production of goods. It would be inaccurate, of course, to contend that all matters involved in the manufacturing and production process are always, and under all circumstances, exempt from Federal control. The *Labor Board* cases, *infra*, show the power of Congress to regulate such matters when their relation to interstate commerce is "close and substantial."²² But because

22. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37.

such conditions generally involve purely intrastate activities which usually fall within the exclusive control of the several states, the extension of Federal control over the intrastate area heretofore has always been cautious and by indirection.

In none of the recent cases, including the *Townsend*, *Curran* and *Mulford* cases, is there any indication, express or implied, that the National Government may directly regulate production. The Court is careful to point this out in the decision in the *Mulford* case:

"The statute does not purport to control production. [italics supplied] It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse." 307 U. S. 38, 47.

A mere intention to ship in interstate commerce does not necessarily make possible Federal control of the productive process. In this regard this tribunal has said:

"We may, therefore, disregard the adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a State that have, or are destined to have, a market in other States, are subjects of interstate commerce, though they

have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production." *Heisler v. Thomas Colliery Co. et al.*, 260 U. S. 245, 259-260.

The factor of intention gives color to activities normally associated with matters of internal concern only where there is a manifest intent to obstruct interstate commerce, as in *United Mine Workers v. Coronado Company*, where this Court said:

"And so in the case at bar, coal mining is not interstate commerce and obstruction of coal

mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred." 259 U. S. 344, 410-411.

The second *Coronado Company* case reiterates the principle:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310.

(d) - The legislative findings of fact contained in Section 2(a) of the Act are an attempt to create powers which were not granted or delegated to Congress under the commerce clause of the Constitution.

There can be no quarrel with the assertion that courts should always approach legislative findings of fact with respect. The legislatures are entrusted with the solemn duty of enacting the laws under which we live. Their deliberations and findings are rightfully entitled to the most painstaking analysis before the judiciary.

should declare that a law has exceeded the constitutional limits of the powers of the enacting body. But the duty of the courts is equally as important. They interpret the constitutions which are the bulwark of our civilization. No matter how sympathetic a court may be towards legislation under constitutional attack, if it transcends the constitutional power of Congress, it should be struck down, and no matter how repugnant legislation may be to the court, if it is in the constitutional orbit, it should be upheld. The ultimate aim and objective of a certain law may be and often is important; the power constitutionally to enact, however, is always more and all-important.

Regardless of whether Congress chooses to include in any of its enactments a declaration of its findings in justification of the legislation, a presumption of constitutional validity attaches to its acts. *United States v. Carolene Products Company*, 304 U. S. 144, and the other cases cited in the brief of the Government, correctly state the force of the presumption, but appellant seemingly misconceives its proper application.

It is notable that almost without exception the cases giving weight to the presumption have allowed it to affect only the question of the reasonableness of the legislation when attacked for alleged violation of the due-process-of-law requirements of the Constitution. Until recently the presumption had been invoked exclusively in cases involv-

ing state statutes enacted under authority of the police power. 36 Columbia Law Review 283. *United States v. Carolene Products Co.*, *supra*, demonstrates that the presumption likewise applies to Federal legislation. The discussion in the *Carolene Products Co.* case, as in prior cases, relates solely to the bearing of the presumption on the question of the reasonableness of the statute challenged; the question of the power of the Congress over the subject regulated was determined without reference to any presumption. It is clear, therefore, that the presumption is relevant only with respect to the mode of exercise of an admitted or judicially approved power—it is concerned solely with the question whether the statute, in effecting a deprivation of life, liberty, or property, has a rational basis.

Whether regulation of a particular subject lies within the commerce power—whether particular circumstances have a “direct” or “indirect” effect upon interstate commerce—is a matter for judicial determination. The principle is analogous to that involved in the field of administrative law in the determination of “fundamental” or “jurisdictional facts.” Cf. *Crowell v. Benson*, 285 U. S. 22. The mere fact that Congress has assumed power to regulate a particular subject does not give rise to any presumption that the power exercised is within those delegated to the National Government.

We respectfully submit that a presumption of constitutionality exists only where the statute has on its

face the imprimatur of constitutionality. Cf. *United States v. Carolene Products Co.*, *supra*. And, in any event, the presumption of a rational basis in support of the legislation can not prevail where there exist facts to the contrary which compel recognition by judicial notice. Cf. *South Carolina Highway Dept. v. Barnwell*, 303 U. S. 177, 191; *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 594.

The inclusion of specific legislative findings can be of no greater force and effect in support of a statute than the presumption of constitutionality, since the presumption, where operative, presupposes the existence of a state of facts in justification of the enactment. The holdings of this Court clearly indicate that such recitals of Congress add nothing to what the Court would otherwise presume.

The legislation under review in each of the cases of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, and *Schechter v. United States*, 295 U. S. 495, contains declarations of Congressional findings. It is noteworthy that the opinions in those cases made no reference to the pertinence of those findings to the issues drawn, although the Court reached contrary conclusions in the two cases with respect to the constitutionality of the statutes presented. The issue as to the validity of the acts was determined by an independent judicial consideration of the conditions regulated without reliance upon the

assertions of Congress as to the nature of their effect upon interstate commerce.

In the *Carter Coal* case, Mr. Justice Sutherland had occasion to discuss the appropriate status of such declarations and characterized them as follows:

"These affirmations—and the further ones that the production and distribution of such coal 'directly affect interstate commerce,' because of which and of the waste of the national coal resources and other circumstances, the regulation is necessary for the protection of such commerce—do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the present act." 298 U. S. 238, 290.

Section 2 of the *Fair Labor Standards Act* transcends its proper sphere. It attempts judicial interpretation under the guise of the fact-finding prerogative. The characterization of the relationship of particular facts to interstate commerce is a judicial function; the Congress may not preclude independent judicial investigation and determination by the simple expedient of labelling particular circumstances as "direct" obstructions to interstate commerce. Cf. *Carter v. Carter Coal Co.*, 298 U. S. 238, 290, 307.

Mr. Justice Brandeis stated the controlling considerations, when he wrote, in another context:

"The legislature must obviously decide, in the

first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity." *Whitney v. California*, 274 U. S. 357, 374.

It is the province of this Court to determine whether the requisite conditions exist to justify the purported exercise of the Congressional power under the commerce clause—whether certain factual situations directly affect interstate commerce. The judiciary is not required to renounce its prerogative in deference to mere assertions by the legislature.

The Government challenges appellee's contention that the declarations of Congress do not raise a presumption of correctness in the determination of the question whether particular matters have a direct or indirect effect upon interstate commerce.²³ The authority relied upon by the Government is contained in a statement by the Court in *Stafford v. Wallace*,²⁴ repeated in *Chicago Board of Trade v. Olsen*.²⁵ It is significant that this statement was made with reference to particular states of facts, the effect of which upon interstate commerce was indisputably direct and plainly visible. In its proper sense, the Court's statement is applicable only to the question

23. Brief for the United States, at 41.

24. 258 U. S. 495, 521.

25. 262 U. S. 1, 37.

whether the practices regulated affect interstate commerce and not whether such effect should be characterized as "direct" or "indirect," for purposes of determining the division of state and Federal powers in a particular instance.

The discussion in the *Stafford* case must have reference to the presumption of constitutionality, since the act under judicial scrutiny did not contain any recitals of fact, the background of the act being a matter of common knowledge. The reiteration of the statement in the *Olsen* case, which involved a statute containing declarations of legislative findings, shows that the treatment accorded such declarations is the same as that to be rendered the presumption of constitutionality.

Unquestionably. "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."²⁶ But, as already suggested, complete logical unity of regulation under the commerce clause is not possible in view of the co-existence of the reserved powers of the states and the commerce power of the Federal Government. When the interests of the perpetuation of our dual form of government so demand, recognition of legal disparity is required.

Appellee sincerely contends that the factual material which has been included in the brief of

26. *Swift & Co. v. United States*, 196 U. S. 375, 398.

the Government is not entitled to any greater weight than the presumption of constitutionality which the Government urges, since the presumption, where operative, presupposes the existence of a state of facts in support of the legislative act. To this Court, the presentation of these factual matters is an oft-told tale. The Government has asserted in all of the recent commerce-clause cases, from the *Schechter* case to the present, that such categories of facts are determinative of the Congressional power. In no case which is controlling in this litigation has the argument of the Government been accepted. See *Schechter Corp. v. United States*, 295 U. S. 495, 548-550; *United States v. Butler*, 297 U. S. 1, 74-75; *Carter v. Carter Coal Company*, 298 U. S. 238, 308-309.

(c) Section 15(a) (1) is an unconstitutional exercise of the power under the commerce clause in attempting to control the evil aimed at in Section 2(a) (1) of the Act.

Appellee does not deny that there is a distinction between the scope of §§15(a) (1) and 15(a) (2) as they relate to interstate commerce. And the validity or invalidity of these two sections purports to rest upon different constitutional grounds. The essence of appellee's argument against the validity of §15(a) (1) is that it does not constitute a permissible regulation of interstate commerce, since it is directed to the attainment of a prohibited end—the regulation of purely intrastate activities, in furtherance of an independent national policy and in absolute defiance of state policy.

Whereas §15(a) (1) attempts to regulate the flow of goods produced without compliance with the statute only after they reach the stream of interstate commerce, §15(a) (2) reaches back and takes command of the production stage itself. It there seeks the direct regulation of the conditions under which goods may be manufactured. However, so far as their coercive effect is concerned, the two provisions are identical. Logically, there is no difference between the power to impose a penalty for shipping goods in interstate commerce which were produced without compliance with specified conditions and the power to impose a penalty for failure to comply with specified conditions before shipment in interstate commerce. In each instance there is imposed a condition upon shipment in interstate commerce which involves the identical form of restraint upon the activities of a producer of commodities for shipment in interstate commerce. We submit that, logically, the same argument is, therefore, applicable against these two provisions of the *Fair Labor Standards Act*. However, since the Government asserts that the validity of the sections rests upon different constitutional grounds, appellee's argument will discuss each of the separate bases of validity urged by the Government.

The Act has first found that a minimum standard of living is necessary for the health, efficiency and general well-being of workers. The next step in the syllogism is the assertion that commerce and the

channels of trade are being used to perpetuate detrimental labor conditions among the workers of the various states. Then §15(a) (1) declares the prohibition. The cycle is complete when the proscribed act is defined as the *production* of goods in which there has been a failure to adhere to the statutory standard of minimum wages and maximum hours. The simplicity of the legislative plan disguises its extreme implications. Suffice it to say that, if it receives the stamp of judicial approval, the states will have been stripped of the power to control their destinies in economic matters, and the Federal Government will have been made supreme in a sense never intended by the Constitution of the United States.

(1) The holding in the *Convict Labor* case is not controlling in this case.

The genesis of appellant's view of the commerce power of Congress is to be found in the decisions which approved the exercise of a *quasi* police power under the commerce clause, supplemental to state action under authority of the ordinary police power. The states were found, in these particular areas, to be impotent to enforce their laws because of their lack of control of the instrumentalities of interstate commerce. The gap was filled by Federal legislation, and the constitutionality of the implementing statutes was time and time again asserted by this Court.²⁷ The character of

27. *Champion v. Ames*, 138 U. S. 321—lottery tickets; *United States v. Popper*, 98 Fed. 423—obscene literature; *Rupert v. United States*, 181 Fed. 87—wild game illegally killed; *Hipolite Egg Co. v. United*

the rights curtailed in each of the foregoing cases is significant. In every instance there was either something in the goods themselves, or in an incidental activity, which had been universally condemned as repugnant to health, welfare or morals.

The Government has urged in its brief the unqualified extension of this doctrine to a prohibition of shipments in interstate commerce of goods which are of themselves proper and useful articles of commerce. The case of *Kentucky Whip & Collar Company v. I. C. R. Co.*, 299 U. S. 334, is cited as authority. In this case, the constitutionality of the *Ashurst-Sumners Act*²⁸ was involved. Under its terms the transmission in interstate commerce of goods made with convict labor into consuming states in violation of their laws was prohibited. The Kentucky concern offered for transportation goods produced with convict labor whose destination lay within a state which had prohibited the sale of convict-made goods within its borders. The carrier refused and a mandatory injunction was sought by the shipper. In a unanimous opinion, this Court upheld the constitutionality of the Act. It is stated by the Government in its brief²⁹ that, if Congress can close the channels of interstate commerce to goods made with convict labor, it

States, 220 U. S. 45—impure and misbranded foods; *Hoke v. United States*, 227 U. S. 308—women transported for immoral purposes; *Brooks v. United States*, 267 U. S. 432—stolen automobiles; *Gooch v. United States*, 297 U. S. 124—kidnapped persons.

28. 46 Stat. 494, U. S. C., Title 49, §561, *et seq.*

29. Brief for the United States, at 62.

can do the same with respect to goods produced with low-cost labor. The assertion shows a misconception of the restricted ruling in the *Whip & Collar Company* case. The Court expressly stated:

"The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the State policy." [italics supplied]-299 U. S. 334, at page 351.

The *Convict Labor* case is not authority for the proposition that Congress may usurp the exclusive control of the affairs of the several states by an extended use of its power under the commerce clause, but it merely holds that Congress may protect, through this power, states which have enacted legislation that deserves protection.

In its broadest aspect, the *Whip & Collar Company* case imposes a barrier to the constitutionality of the *Wage and Hour Act*. The decision necessarily accepted the argument that economic and legislative experiments in one state may be protected from competition originating in states whose customs and laws differ. This is as it should be. The case portrays the State and Federal Governments operating co-operatively in their proper spheres. It points out the sure and true road

over which social experimentation should travel. It is low-gear, rather than high-gear, legislation. Its precept will preserve for our national economy one of its most valuable attributes—the power of the states to progress by trial and error without imposing on the country at large the burden of inevitable mistakes. It has been aptly put by Mr. Justice Brandeis in his famous dissenting opinion in *New State Ice Co. v. Liebmann*:

“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” 285 U. S. 262, 311.

(2) A prohibition of shipments in interstate commerce, except under specified conditions, is not necessarily a permissible exercise of the Congressional power.

It is asserted by the Government that the sales, shipments and deliveries prohibited by §15(a) (1), of and in themselves, constitute interstate commerce and that a prohibition of interstate shipment except in compliance with prescribed conditions, being on its face a regulation of interstate commerce falls within the commerce power granted to Congress by Section 8 of Article I of the Constitution. It is, of course, admitted that interstate shipments are interstate commerce, but it is not so clear and undeniable as the Government contends that the prohibition of such transactions, in every event, constitutes a valid regulation of interstate

commerce. *U. S. v. Butler*, 297 U. S. 1, and *Hammer v. Dagenhart*, 247 U. S. 251, satisfactorily demonstrate that the "attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."³⁰

In support of its thesis the Government treads upon dangerous ground in asserting: "The power of Congress is measured by what it regulates, not by what it affects."³¹ It is apparent that this statement is but a half-truth. The "effects" of a particular regulation of commerce upon intrastate and extra-state or national matters are always regarded as of primary importance in disputes as to the proper and constitutional spheres of control of the state and national powers under the commerce clause. The perpetuation of our dual system of government demands such consideration. The case of *Hammer v. Dagenhart*, 247 U. S. 251, is directly in point. An Act of Congress³² prohibited the transportation in interstate commerce of goods which had been produced with child labor. The Court held the statute unconstitutional as an invasion of the police powers of the states. There, as here, the statute closed the channels of interstate commerce to goods not produced in compliance with prescribed conditions. Insofar as the restriction operated upon shipments, it was an admitted control of interstate commerce. But this Court recognized that the

30. 297 U. S. 1, at 68.

31. Brief for the United States, at 13.

32. Act of September 1, 1916, 39 Stat. 675.

Constitution imposes well-defined boundaries for the exercise of Federal power over commerce among the states. These limitations are not necessarily express or dependent upon a solitary constitutional provision, but may arise by implication and may be the result of a combination of provisions. The line of demarcation was blazed in that case, as it should be here, in order to prevent improper encroachment upon the appropriate sphere of state control.

It is undeniable that *Hammer v. Dagenhart* has been severely criticized. It was burdened both by a brilliant dissenting opinion³³ and by universal condemnation of the underlying evil at which the statute was aimed. But the real basis of the decision, as already pointed out, was that the *Child Labor Act* was repugnant to the Constitution because it subjected state policy to national domination. This rule of itself has never been questioned.

The *Labor Board* cases³⁴ which are cited by the Government in defense of the *Fair Labor Standards Act*, sustain this principle. "Undoubtedly the scope of this power must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of

33. Justice Holmes at 277 of 247 U. S.

34. *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1; *National Labor Relations Board v. Fruehauf Company*, 301 U. S. 49; *National Labor Relations Board v. Friedman-Harry Marks Clothing Company*, 301 U. S. 58.

our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, at page 37. In *Hammer v. Dagenhart*, the Court could not close its eyes to the fact that the Act was purely a regulation of the conditions of production of goods solely in furtherance of a national policy independent, and in defiance, of state policy. The Act would have completely nullified the police power of the states, and if held valid, considerations of degree would have become irrelevant in drawing the line of demarcation between the Federal power over interstate commerce and the police power of the states over internal matters. The "indestructible Union, composed of indestructible States" would have been converted into an omnipotent Union of puppet sovereignties. The *Child Labor Tax Act*, held unconstitutional in *Bailey v. Drexel*, 259 U. S. 20, attempted the same type of regulation, and the policy of the *Fair Labor Standards Act of 1938* attempts to produce the identical result which was abhorred in the *Hammer* and *Bailey* cases.

We respectfully urge that there is no merit in the unqualified proposition urged by the Government that the imposition of conditions upon shipment in interstate commerce is necessarily a regulation of interstate commerce. Clearly, the subjects upon which the conditions react must be examined to determine whether

the purported regulation has the requisite relation to interstate commerce to constitute a valid exercise of the Federal power. The logical conclusion of the Government's argument is that Congress might impose, as a condition of shipment in interstate commerce, that all of the employees of a producer, whether the duties of such employees related in any manner to the production of goods for interstate commerce, be employed and paid in accordance with the standard stipulated. *Reducere ad absurdum*, if the prohibition is to be the sole determining factor in the test of validity, Congress could deny the channels of interstate commerce to commodities produced with labor of a certain creed or color. Aside from considerations of due process, the analogy is exact.

(3) The respective governmental interests of the National Government and of the several states in commerce in useful and harmless commodities differ in character from their respective interests in commerce in harmful and deleterious articles.

It is argued that the power of Congress to restrict or impose conditions upon interstate commerce in useful and harmless articles is coextensive with its power to restrict or condition interstate commerce in articles which are harmful or deleterious. The inference which the Government attempts to draw from the cases cited at page 62 of its brief is not decisive on this score. A clear distinction does exist between the power of Congress to prohibit interstate shipments of harmful and deleterious goods and its power to regulate shipments

of useful commodities. The respective state and national interests involved and the effects on interstate commerce and on matters of local concern within the states are distinct in the two cases. The effect of harmful and deleterious commodities upon both interstate commerce and intrastate matters is plainly visible and indisputable. They react with the same harmful effect upon all interests of both our Federal and State Governments. On the other hand, the effects upon commerce of conditions relating to the production and shipment of useful commodities are not so easily ascertainable, and the respective interests of the several states and the Federal Government are often at variance.

The cases discussed in the first paragraph on page 64 of appellant's brief and at page 31 of appellee's brief, approve the Federal power to prohibit shipments of harmful and deleterious commodities or articles in relation to which there is existent some incidental activity, universally condemned as repugnant to health, welfare or morals. The statutes in each of those cases were sustained not alone because on their face they were regulations of commerce, but, more important, because it was impossible to argue effectively that any powers of the states were adversely affected thereby.

Similarly, the states, themselves, are empowered to prohibit interstate shipments of harmful goods, where shipments of useful articles of commerce could not be

so regulated. It is well settled that a state may prohibit interstate commerce so as to make effective a quarantine against disease.³⁵ The same power exists to prohibit the shipment in interstate commerce of game illegally killed³⁶ and unripe citrus fruits.³⁷ The cases have denied state power to prohibit certain interstate shipments, as, for example, in the decisions involving state efforts to keep at home certain resources, such as natural gas³⁸ and unshelled shrimp.³⁹ These holdings make it manifest that the diverse interests of the several states in these useful commodities prevent the exercise of state powers which constrict the free flow of interstate commerce.

The underlying principle of all of the decisions involving prohibitions of shipments in interstate commerce, whether concerned with an exercise of power by the Federal Government or an exercise of power by a state government, seems dependent upon the preservation of a balance between all of the local, extra-state and national interests involved. We respectfully contend that a prohibition of shipments in interstate commerce of harmful commodities does not infringe upon, but is a supplement to, the powers of the other governmental units which might be affected, whereas in the

35. *Rasmussen v. Idaho*, 181 U. S. 198; *Smith v. St. L. & S. W. Rwy. Co.*, 181 U. S. 248; *Aasell v. Kansas*, 209 U. S. 251.

36. *Geer v. Connecticut*, 161 U. S. 519.

37. *Sligh v. Kirkwood*, 237 U. S. 52.

38. *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania v. West Virginia*, 262 U. S. 553.

39. *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1.

case of useful and harmless commodities the separate interests are diverse and are unequally affected by the individual regulatory efforts of the governments concerned.

(4) The power of Congress is restricted to commerce among the several states, and the validity of an exercise of this power is not primarily determined by its tendency to promote the general welfare.

We agree that the power of Congress over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. Congress possesses the same unlimited authority over the former field as do the states over the latter in exercising their respective police powers for the public benefit. However, the delimitation of "the field of interstate commerce" is the crucial matter, since it is only within this sphere that the Congressional power may operate. The Congress does not have any broad general power to legislate for the promotion of the general welfare or for the furtherance of humanitarian ends unrelated to matters of commerce with foreign nations and among the several states. It is not appellee's contention that the *Fair Labor Standards Act* must be held invalid simply because it is concerned with humanitarian ends. Such an objection could no more be supported than the converse, which is the Government's argument. The statute involved in the present case should be held invalid because the preservation of the powers of the states overbalances any national interest which may be involved.

It is axiomatic that the Congressional power extends only to "that commerce which concerns more states than one," including "those internal concerns which affect the states generally," in contrast to "the completely internal commerce of a state,"⁴⁰ but this formula does not of its own terms settle the problem of the validity of a particular exercise of power by the Congress. The respect in which intrastate matters "affect the states generally" and in which commerce "concerns more states than one" remains to be determined in individual cases. Mere similarity of commercial problems which are common to all of the states does not mean that Congress may legislate with respect to such problems. Examples of matters of local concern which are of national interest because of their universal recurrence in the various states come easily to mind. One very striking problem will serve to illustrate the point. The concentration of population in urban areas and the increasing use of motor vehicles have created serious traffic problems in all of the states of the Union. Yet it could not be seriously urged that the cumulative effect of these conditions upon commerce among the states and the general prevalence of these conditions throughout the country would render valid uniform regulation of traffic by Congress. Identical considerations are applicable to the present case.

40. *Gibbons v. Ogden*, 9 Wheat. 1, 194-195.

(5) The necessary effect of Section 15(a), (1) is to regulate directly conditions of production.

It is readily apparent that §15(a) (1), though in terms prohibiting only interstate shipments and sales, is aimed at the regulation of production rather than regulation of commerce. A casual reading of the statute is sufficient on this score. A similar prohibition was denied validity in *Hammer v. Dagenhart*. The characterization of this latter prohibition by the Government's counsel in another case admirably expresses appellee's contention here: "The legislation was cast in the form of commerce regulation to achieve a non-commerce purpose, to impose upon those engaged in production a prescribed labor policy."⁴¹ Irrespective of the motive of Congress in enacting the *Fair Labor Standards Act of 1938*, the infringement upon state powers effected thereby is destructive of our dual system of government and should not be permitted.

The analogy which the Government attempts to draw between the prohibition imposed by the *Wage and Hour Law* and the prohibition involved in *Mulford v. Smith*, is inept. A distinction is readily manifest between the imposition of quotas at interstate markets, the focal points at which there is a centralization of complete control of the interstate flow of commodities, and the imposition of conditions to interstate shipment which carry the coercive effect of an undisguised dictation in

41. Brief for the United States in *Schechter v. United States*, Nos. 854 and 864, October Term, 1934, at 81.

conditions of production. The former operates directly on interstate commerce and indirectly on production, while the latter is an unmistakable and direct regulation of production. Permissible regulation of intrastate activities depends largely upon considerations of degree. Under the *Fair Labor Standards Act*, this criterion has been forgotten and ignored.

An historical distinction may serve to clarify the point. In *Brown v. Maryland*, 12 Wheat. 419, this Court held invalid a direct and undisguised state tax upon wholesalers of foreign articles. In the *License* cases, 5 How. 504, on the other hand, the Court sustained state statutes the effect of which was to impose a similar tax upon retailers of foreign articles. It is clear that the tax in each instance had, in all probability, an identical effect upon foreign commerce, but the statute which operated directly upon foreign commerce at the moment of the entry of the articles into the territorial limits of the states was held invalid, while the statutes which affected commerce in foreign articles indirectly were sustained.

Correspondingly, the Congressional power over interstate commerce is limited to the regulation of intrastate activities which directly affect interstate commerce. " * * The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional

system."⁴² This distinction "turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about."⁴³ Conditions in production like those involved in the case at bar have always been held to affect interstate commerce in an indirect manner and, therefore, their control is subject solely to the reserved powers of the states. The prohibition in §15(a) (1) produces the same result upon interstate commerce as a direct prescription of conditions of production and should be held violative of the Constitution.

The Government has misconstrued the argument of appellee in describing as "the substance of the opposing argument * * * that any regulation of commerce which has a necessary effect upon matters outside the sphere of federal control is invalid."⁴⁴ The real basis of appellee's argument rests upon a recognition of the established duality of sovereignties under the Constitution. Under this view, all of the circumstances surrounding the exercise of power over commerce must be examined realistically in each instance. The determination is an individual one and depends largely upon a proper balancing of local and national factors.

42. *Schechter v. United States*, 295 U. S. 495, 548.

43. *Carter v. Carter Coal Co.*, 298 U. S. 238, 308.

44. Brief for the United States, at 68.

(6) The ruling in *Hammer v. Dagenhart* is not inconsistent with the distribution of powers provided in the Constitution.

A final word must be said with respect to the discussion of the case of *Hammer v. Dagenhart* in the Government's brief. Appellant's argument urges the mistaken proposition that "since the states are precluded by the commerce clause itself from forbidding interstate shipments of goods produced under substandard labor conditions, the decision created a no-man's land in which neither state nor nation could function," and that "the establishment of such a hiatus in governmental power is plainly contrary both to the letter and spirit of the Constitution."⁴⁵ It has already been demonstrated that the states do possess an effective power to forbid interstate shipments. Moreover, as shown by the *Kentucky Whip & Collar* case, cooperating state and national powers have been fully capable of imposing needful restrictions. There is nothing in the Constitution which indicates that there are any legislative powers which belong to, although not expressed in, the grant of powers in Section 8^o of Article I of the Constitution. The proposition that every conceivable legislative power is conferred by that section is in direct conflict with the doctrine that the Federal Government is a government of enumerated powers. Moreover, the words of the Tenth Amendment clearly show that there is no necessity for a finding

45. *Id.*, at 69.

that legislative power over every matter of concern to the people of the states and of the nation is lodged in either the State or Federal Governments, individually or collectively, since that provision of the Constitution expressly stipulates that certain powers are reserved to the *people*.⁴⁶

(f) Section 15(a) (2) is an unconstitutional exercise of the power under the commerce clause in attempting to control the evil aimed at in Section 2(a) (1) of the Act.

The Government asserts that §15(a) (2) may be supported on the same ground as §15(a) (1), since it is a provision reasonably designed to effectuate the prohibition against interstate shipments contained in the latter section. By this statement, the Government repudiates its own distinction between a prohibition having the effect upon production which §15(a) (1) unquestionably causes and a direct regulation of the conditions of production, *eo nomine*.⁴⁷ The Government attempts to justify the direct regulation effected by §15(a) (2) upon several theories.

46. Cf. *Kansas v. Colorado*, 206 U. S. 46, 89-91.

47. The argument of the Government in support of §15(a) (1) rests largely upon the dissenting opinion of Justice Holmes in *Hammer v. Dagenhart*. Justice Holmes and the minority in that case were willing to admit that even though a bare prohibition of shipments in interstate commerce should be held valid irrespective of its "indirect effects" upon the methods of production in the states, nevertheless Congress can not directly intermeddle with such methods of production. See *Hammer v. Dagenhart*, 247 U. S. 257, 277, 278. The scope of the power urged by appellant extends to indeterminate limits outside the area defined for the exercise of the Federal power over commerce among the states in the most far-reaching utterance of any member of the Supreme Court.

(1) The asserted necessity for uniform regulation of wages and hours can not bring these subjects within the purview of the Federal commerce power.

In the first place, it is argued that effective regulation of interstate commerce demands uniform regulation of intrastate matters. A simple answer to that contention is that administrative expediency can not excuse regulation of intrastate matters where the result is to obscure completely the proper boundaries of national and state power. A comparable argument was urged in the *Schechter* and *Carter Coal* cases. In each instance, the Court rejected the contention and commented at considerable length upon the power of Congress to remove the inharmonious conditions in the various states.⁴⁸ *Schechter v. United States*, 295 U. S. 495, 507-508; *Carter v. Carter Coal Co.*, 298 U. S. 238, 292, *et seq.* It is submitted that the effect of the *Wage and Hour Law* is to grant complete domination to the National Government of the internal affairs of the states. If the Act be sustained, state lines will be of interest in the future solely as historical and geographical markers.

48. This contention was described in the oral argument of Frederick H. Wood, Esq., in the *Carter Coal Company* case in the following manner: "This is but the timeworn and threadbare argument that the Federal Government is empowered to legislate as to all matters in which uniformity is deemed desirable in the interest of the general welfare of the nation as a whole, and that in such circumstances the Congress may, under the pretext of the commerce clause, provide for such uniformity. This argument was rejected by this court in *McCulloch v. Maryland*, demolished in *Kansas v. Colorado*, and repudiated in the *Schechter* case." 298 U. S. 238, 246.

A recent utterance of this tribunal is worthy of consideration in this connection:

"Until recently no suggestion of the existence of any such power in the federal government has been advanced. The expressions of the framers of the constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestions that there exists in the clause under discussion or elsewhere in the constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual States obliterated, and the United States converted into a central government exercising uncontrolled police power in every State of the Union, superseding all local control or regulation of the affairs or concerns of the States." *United States v. Butler*, 297 U. S. 1, 77.

To the very present time this Court has consistently refused to permit inroads by the Federal Government upon the reserved powers of the states under the guise of a regulation of interstate commerce. The *Carter Coal* case, 298 U. S. 238, the *Schechter* case, 295 U. S. 495, and *United States v. Butler*, 297 U. S. 1, indicate the barriers erected to halt invasion by the Federal powers. Although the *Schechter* case involved the regulation of activities *subsequent* to interstate shipment of goods, while the *Fair Labor Standards Act* attempts the regulation of activities *prior* to interstate shipment, the constitutional principles applicable are

the same. The *Carter Coal* case expressly so holds and reviews the relevant authorities. The following language from that decision is significant:

"The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the *Schechter* case, *supra*. The only perceptible difference between that case and this is that in the *Schechter* case the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. *That difference is without significance.* [italics supplied] The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the *Schechter* case. On the contrary, the situations were recognized as akin." 298 U. S. 238, 309.

"A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended." 298 U. S. 238, 310.

(2) The statutes and cases cited by appellant are not controlling upon the circumstances of this case.

The well-established doctrine which permits the regulation of intrastate transactions, which are so commingled with interstate transactions that all must be regulated if the latter are to be effectively controlled, is inapplicable to this litigation. The factual situations before the Court in the cases cited at the top of page 73 of the Government's brief are in nowise comparable to the situation in the industry of which appellee is a part. The factors which were controlling in the *Schechter*, *Carter*, and similar cases more nearly correspond to those here involved.

The statutes and cases referred to on pages 73 and 74 of appellant's brief are clearly distinguishable. We respectfully urge that the validity of the *Meat Inspection Act* (34 Stat. 1260, U. S. C., Title 21, §78) was sustained by reason of the peculiar conditions prevailing in the meat packing industry, and is governed by the considerations applied in *Stafford v. Wallace*, 258 U. S. 495.

The cases relating to the power of the Secretary of Agriculture to inspect and treat defective cattle and relating to the scope of the *Food and Drugs Act* (34 Stat. 768, U. S. C., Title 21, §2), are unaffected by any considerations applicable under the system of dual sovereignties established by the Constitution. The identity of the interests of all of the governmental units

involved with respect to infected commodities has already been discussed. These cases are easily reconcilable with the *Carter* and *Schechter* cases under this analysis.

It is true that Congress is not required to withhold its hand until actual movement in interstate commerce begins. However, Congress may extend its power only to those transactions occurring before the commencement of interstate movement whose relationship to interstate commerce is sufficiently close and substantial to justify Congressional action, under the decisions of this Court. It is contended by the Government that direct regulation of conditions in the production of goods for interstate commerce tends to effectuate and implement the policy of keeping goods manufactured under prohibited conditions out of commerce. The validity of §15(a) (2) is not to be determined alone by its effectiveness for that specific purpose. Manifestly, a requirement that all producers, whether engaged in interstate or intrastate commerce, should comply with the standard prescribed by the statute would be even more effective to accomplish the result desired under the Congressional policy, but the interests of the states and the perpetuation of our dual system of government prevent this character of regulation.

(3) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not affect interstate commerce in such manner as to be subject to the regulatory power of Congress.

Section 2 of the *Wage and Hour Law* recites that the existence of sub-standard labor conditions "burdens commerce and the free flow of goods in commerce," and this is urged as a justification for the imposition of Federal control.

This Court need not be reminded that it has always found otherwise. In the numerous instances in which this contention has been urged, the Court has replied simply that the direct effect on interstate commerce implied in such statement has no existence in fact or in legal contemplation. The approach of the Court has been realistic, and its adjudications clearly indicate the controlling considerations in the determination of the effect on interstate commerce of a particular intrastate matter.

The applicable test has been formulated in terms of *direct* and *indirect* effects on interstate commerce. The *Labor Board* cases, which are urged by the Government in support of the constitutionality of the *Fair Labor Standards Act*, recognize the distinction as delimiting the power of the National Government. The following statement of the Court clearly so indicates:

"Although activities may be intrastate in character when separately considered, if they have

such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress can not be denied the power to exercise that control. *Schechter Corp. v. United States*, *supra*. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37.

A long and unbroken line of cases establishes that it is the usual rule that the conditions in production of goods for interstate commerce have only an indirect effect upon interstate commerce.⁴⁹ Of course, the oft-reiterated conclusion that "production is not commerce" is simply a convenient formula of the Court, but it serves to reflect the division of powers between the states and nation contemplated by the Constitution.

The differences in the terminology of the *National Labor Relations Act* and the *Fair Labor Standards Act* and consideration of the precise holdings in the

49. *Kidd v. Pearson*, 128 U. S. 1; *United States v. E. C. Knight Co.*, *supra*; *Coronado Company cases*, *supra*; *Heisler v. Thomas Colliery Company*, *supra*; *Oliver Iron Co. v. Lord*, 262 U. S. 172; *Hammer v. Dagenhart*, *supra*. These decisions were reviewed and approved by the Supreme Court in the *Carter Coal* case. See *Carter v. Carter Coal Co.*, 298 U. S. 238, 299, *et seq.*

Labor Board cases vitiate any convincing argument based upon those cases. The operation of the *Wagner Act* is dependent upon the existence of "unfair practices affecting commerce." In each case the effect on interstate commerce must be shown to support the application of the statute. The *Wage and Hour Law* extends to employees "engaged in commerce or in the production of goods for commerce," thereby assuming that labor relations in all industries producing goods for commerce "affect" commerce in a respect which authorizes Congressional control. The error in such assumption is indicated by the emphasis placed by this Court upon the flexibility of the *Wagner Act* in the *Jones and Laughlin* case, in which it is stated that the statute "purports to reach only what may be deemed to burden or obstruct * * * commerce, and, thus qualified it must be construed as contemplating the exercise of control within constitutional bounds," and "whether or not particular action does affect commerce * * * is left by the statute to be determined as individual cases arise." 301 U. S. 1, 31, 32.

The industries involved in the *Labor Board* cases were organized on a nation-wide scale, and the relation of their operations to interstate commerce was the dominant factor in the enterprises. The Court, in sustaining the *National Labor Relations Act* as applied to such industries, placed great emphasis on such character of the establishments and on the complete dependence of the interstate flow of the goods produced

upon peaceful labor conditions in the plants wherein labor conditions were regulated. The language of the Court in this regard is crucial in its application to the *Fair Labor Standards Act of 1938*:

"Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate

commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience." 301 U. S. 1, 41.

The later cases construing the *Wagner Act* have involved enterprises of lesser magnitude than *Jones & Laughlin Steel Corporation*, but the effect on interstate commerce of the industries considered in these cases obviously was quite as "close and substantial." *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, offers the closest analogy to the *Jones & Laughlin* case. The facts showed that there was normally throughout the year a continuous day-by-day flow of shipments of raw materials to Fainblatt's factory from points without the state, and of finished garments from the factory to New York City and other points outside of New Jersey. Immediately preceding a strike of thirty-four of the workers in the tailoring department of the plant, which was found to have been induced by the unfair labor practices of the employer, shipments were about eighty per cent. of those for the corresponding period of the previous year. Following the strike, output decreased by more than one-half, or to thirty-eight per cent. of the shipments for the corresponding period of the previous year. It is apparent that the relation of the factory in this case to interstate commerce was identical to that of the plant in the *Jones & Laughlin* case. There was a continuous flow of goods in interstate commerce through the factory,

and hence control was focalized in the manufacturing plant. The Court centralized its holding on the proven facts.

A factual situation comparable to that existing in the *Fainblatt* case was before the Court in *National Labor Relations Board v. Bradford Dyeing Association*, No. 588, October Term, 1939. As in the former case, the materials processed were moved to and from the processor by their owners through the channels of interstate commerce. The relation of the activities of the processor to interstate commerce was identical with that in the *Fainblatt* case, which decision was held to be controlling upon the question of the jurisdiction of the Board.

The case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, similarly indicates the significance of the factual situation in determining the applicability of the *Wagner Act*. The concern there regulated derived approximately 37% of its business from interstate and foreign commerce. It was plainly shown, however, that a labor dispute involving warehouse employees had a direct and substantial effect upon interstate shipments of the concern. In this regard, the Court stated in part:

“The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these prac-

tices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceful adjustment of labor disputes.

* * * *

"Such questions can not be escaped by the adoption of any artificial rule.

"The direct relation of the labor practices and the resulting labor dispute in the instant case to interstate commerce and the injurious effect upon that commerce are fully established. * * * The immediacy of the effect of the forbidden discrimination against these warehousemen is strikingly shown by the findings of the Board. When the men found themselves locked out because of their joining the union, they at once formed a picket line and this was maintained with such effectiveness that eventually 'the movement of trucks from warehouse to wharves ceased entirely'." 303 U.S. 453, 467, 468.

The required effect on interstate commerce was shown to bring the business within the purview of the *National Labor Relations Act*. The employees concerned in the *Santa Cruz* case were not manufacturing or production employees, but were engaged in loading and unloading goods for interstate and foreign shipment after processing and manufacture had been completed. Thus, the effect upon interstate commerce of a strike among these workers was clearly direct, since their duties related to interstate and foreign commerce at the point of entry of the commodities produced into the stream of commerce.

The *Consolidated Edison Company* case, 305 U. S. 197, dealt with a concern conducting wholly intrastate operations, but the facts showed that the peaceful and continued operation of the enterprise was indispensable to interstate and foreign commerce. The Court reviewed at great length the findings of the Labor Board and stated:

"It can not be doubted that these activities, while conducted within the State, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power. The effect upon interstate and foreign commerce of an interruption through industrial strife of the service of the petitioning companies was vividly described by the Circuit Court of Appeals in these words: 'Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we can not regard as indirect and remote.' 95 F. 2d. 390, 394." 305 U. S. 197, 221.

The effect on interstate and foreign commerce was palpably direct and immediate.

The remaining cases which have sustained regulation by Congress of apparently local activities, which are pertinent to the present issue, involved situations which are akin to that found in the *Jones & Laughlin* case. These cases have upheld regulation of intrastate activities at vital points in the "stream of interstate commerce." The effect of such local activities upon interstate commerce obviously is direct, since there is a centralization of complete control of the interstate flow at such vital points. A breakdown in these compressed areas would result in an immediate demoralization of interstate commerce.⁵⁰ This line of cases includes *Chicago Board of Trade v. Olsen*, 262 U. S. 1, *Stafford v. Wallace*, 258 U. S. 495, and similar cases. The *Meat Inspection Act*,⁵¹ to which reference is made by the Government's counsel,⁵² and which has already been distinguished from the *Wage and Hour Law*, is comparable to the legislation upheld in *Stafford v. Wallace*, and *Chicago Board of Trade v. Olsen*. We submit that these decisions are inapplicable in support of the *Fair Labor Standards Act* since they were dependent upon and restricted by the attendant facts in each particular case.

50. The point of control in the *Jones v. Laughlin* case was likened to the heart of interstate commerce and in the *Mulford* case to its throat. "Summarizing these operations, the Labor Board concluded that the works in Pittsburg and Aliquippa 'might be likened to the heart of a self-contained, highly integrated body'." Chief Justice Hughes in *Labor Board v. Jones & Laughlin*, 301 U. S. 1, at page 27. "It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce—the marketing warehouse." Mr. Justice Roberts in *Mulford v. Smith*, 307 U. S. 38, at page 47.

51. 34 Stat. 1256, U. S. C., Title 21, §§71, et seq.

52. Brief for the United States, at 73.

The Government contends that the decision in the *Carter Coal* case, *supra*, has been undermined by the *Labor Board* cases, *supra*, and, therefore, that the *Carter* case has been overruled by implication. This proposition can not be sustained. In the first place, this Court has made express reference to the rule of the *Carter Coal* case in the very decisions which are alleged to have overruled it. See *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 34-35, 40-41; *Santa Cruz Co. v. National Labor Relations Board*, 303 U. S. 453, 466; cf. *Sunshine Anthracite Coal Co. v. Adkins*, No. 804, October Term, 1939, 84 L. ed. 825, 832. And it is not the policy of the Court as presently constituted to overrule by implication. See, e. g., *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Helvering v. Hallock*, 309 U. S. 106. Secondly, the Court has been careful to confine its holdings in these decisions to the particular fact situations presented. The portions of the opinions in the *Jones & Laughlin* and *Santa Cruz* cases, already quoted, and the following excerpt, sustain this proposition:

"In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion. It is not necessary to repeat what we said upon this point in the review of our decisions in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, *supra*. And whether or not particular action in

the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. *Id.*, see, also, *Santa Cruz Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, 467." *Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 222.

(4) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not constitute such an unfair method of competition as to be subject to the regulatory power of Congress.

The third finding of the Congress is that the maintenance of sub-standard labor conditions constitutes an unfair method of competition in commerce. This is an attempt to bring the *Wage and Hour Act* within the doctrine of the *Federal Trade Commission* cases⁵³ (in which unfair marketing practices, with a subsequent diversion of trade from fair sellers, were condemned), or within the scope of the decisions⁵⁴ which regulated monopolistic practices in interstate trade.

53. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483—false labelling; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67—misleading labelling; *Federal Trade Commission v. Keppel*, 291 U. S. 304—gambling sales methods; *Fox Film Corp. v. Federal Trade Commission*, 296 Fed. 353—misleading naming of old motion pictures; *Federal Trade Commission v. Civil Service Training Bureau, Inc.*, 79 F. (2d) 113—misleading name.

54. *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554—acquisition of shares of competitor; *Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission*, 291 U. S. 587—holding company to hold shares of two competing corporations; *Northern Securities Company v. United States*, 193 U. S. 197—holding company to hold stock of competing carriers; *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291—acquisition of shares of competitor.

The doctrine that the production of goods with low-cost labor constitutes a method of "unfair competition" in interstate commerce which is susceptible to regulation by Congress has no basis in precedent.⁵⁵ There is no question of the public being misled. The contrary doctrine would be a dangerous and radical extension of the concept of "unfair competition." The result would be that there would be no permissible competitive advantages by reason of differentials in the cost of ingredients of production. The varying economic conditions in different industries in different localities would be disregarded. Merely to assert such a doctrine proclaims its inherent danger.

Appellant urges that the determination of the precise practices which are to be considered as against public policy is obviously a legislative matter and that, so far as the scope of the commerce power is concerned, the nature of the practice is not material, as long as it does in fact divert the course of interstate trade from one competitor to another. Manifestly, it is for Congress to decide what conditions which directly affect interstate commerce are harmful to that commerce and require regulation. The limits of this power, however, are clearly set forth in the cases which determine the activities or practices affecting commerce which bear a direct or indirect relation to interstate commerce.

The broad proposition formulated by the Government again entirely overlooks considerations of degree.

55. Cf. *Schechter v. United States*, 295 U. S. 495, 531.

The argument that labor practices of the character regulated by the *Fair Labor Standards Act* affect interstate commerce directly and constitute an unfair method of competition in interstate commerce was forcefully presented to the Court in the *Schechter* case and in the *Carter* case. The application of the test of directness reiterated in those cases unequivocally shows that the measure of Congressional power to regulate methods of competition in interstate commerce is contained in the conventional test.

The fact that it is demonstrable that particular practices divert trade from one producer to another is not of itself determinative of the constitutional question of power. The identical argument of the Government was expressly rejected by this Court in the *Schechter* case where it was said in effect that the power of Congress under the commerce clause to regulate practices affecting competition in interstate commerce may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several states" and the internal concerns of a state.⁵⁶ It is clear that it is no part of the authority or duty of the Federal Government to prevent the diversion of business from one producer to another or from one state to another, under the free play of competition, unless the factors responsible for such diversion can

56. See *Schechter v. United States*, 295 U. S. 495, 549-550.

be held directly to affect interstate commerce under the qualifying principles established by the decisions of this Court.

A direct analysis of the contention of the Government as to the legitimate scope of Congressional power will demonstrate that the argument is but an indirect attack upon the dual system of government established by the Constitution. Dissatisfaction with constitutional forms, whether founded or unfounded, should not justify the obliteration of political lines by the device of varying judicial construction. The briefest reflection will suffice to convince that, if the theory is once accepted that the Constitution confers a power of undetermined extent to regulate anything and everything which "affects" interstate commerce through the flux of economic forces, the Constitution will have been amended by statute into a document which would never have been adopted or ratified originally, and the whole theory upon which the Federal system of this nation was founded and upon which it has been maintained will have been abrogated.

The argument based upon economic facts, as held in the *Schechter* case, proves too much. "If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of

costs, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled." *Schechter v. United States*, 295 U. S. 495, 549.

The unprecedented theory of Federal power formulated by the Government would solve the problem of the division of governmental powers by rendering the Federal Government dominant in all commercial and economic matters. No such power of complete control over the economic life of the people and of the states lies submerged in the simple grant of power "to regulate commerce among the several states." The obvious answer to the dilemma, if the present division of powers under the Constitution be deemed inadequate to meet the exigencies of the times, has been indicated by the Chief Justice:

"If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision." *Carter v. Carter Coal Co.*, 298 U. S. 238, 318.

Still another serious danger to the preservation of the constitutional form of Union lies within the proposition asserted by the Government. The power to control the conditions of production in the manner

attempted by the *Fair Labor Standards Act of 1938* is the power to impose the standard of living of one section of the country upon another, to discriminate against the industries of one section and in favor of those of another, and to equalize economic conditions by eliminating the economic advantages of more fortunate localities. If Congress may eliminate differentials in labor conditions, it may likewise eliminate other economic differentials which affect conditions in interstate commerce. For example, it is perfectly consistent with the Government's theory to urge that Congress, by the simple power exercised by the enactment of the *Wage and Hour Law*, may directly regulate *methods* of production and may equalize competitive conditions by penalizing areas and industries which have the advantage of cheap power. An utterance of this Court is prophetic of the consequences of such a power: "Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them." *Kidd v. Pearson*, 128 U. S. 1, 21-22. Without exception, the instances of control by Congress of methods of competition which have been sustained by the Court have operated uniformly throughout the length and breadth of the nation and have been unaffected by any considerations of sectional differences. The unfair methods of competition so curbed have been universally

condemned as destructive of the interests of the nation at large. In any event, the effects of activities within this new field of regulation claimed by Congress upon the respective interests of the states and nation are so nebulous and measured with such difficulty that the conventional and orthodox requirement that intrastate activities shall affect interstate commerce in a direct fashion to authorize Congressional regulation must still be held applicable with respect to matters affecting interstate competition.

The cases under the *Federal Trade Commission Act* and under the *Sherman Act*, cited in the Government's brief,⁵⁷ are inapplicable to the instant case. Without exception in those decisions the condemned practices tended to *restrict* competition in interstate commerce. It was not conclusive that the forbidden transactions merely diverted trade from one competitor to another, but the important feature was that such practices restricted interstate competition and, thus, there was a tendency to establish monopoly. A quotation from one of the cases cited by the Government demonstrates that the mere characterization of particular commercial practices as unfair is not the sole determining factor in the cases under the *Federal Trade Commission Act*, but that elimination of competition tending to establish monopoly is an additional requisite to the operation of this Act:

"In a case arising under the Trade Commission Act, the fundamental questions are, whether the

57. Brief for the United States, at 78-79.

methods complained of are 'unfair,' and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein.'" *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 647.

As already indicated, the argument here presented by the Government was likewise advanced to justify the promulgation of the codes under the *National Industrial Recovery Act*. In the case of *Schecter Corporation v. United States*, 295 U. S. 495, 531, it was disposed of by the Chief Justice in the following manner:

"The Act does not define 'fair competition.' 'Unfair competition,' as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. *Goodyear Manufacturing Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140; *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 413. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own,—to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U. S. 215, 241, 242. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law. *Id.*, p. 258. But it is evident

that in its widest range, 'unfair competition,' as it has been understood in the law, does not reach the objectives of the codes which are authorized by the *National Industrial Recovery Act*."

And it has been seen that the self-same theory was resurrected⁵⁸ only to be ignored by the Court in the *Carter* case. The opinion of Mr. Justice Sutherland indicates that the theory was not worth an extended discussion and this much is illustrative:

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control." 298 U. S. 238, 308.

None of the cases cited and discussed by the Government establishes a doctrine of comparable breadth to that asserted by appellant. All of the recent cases decided by this Court which have determined the permissible scope of Congressional regulation of economic factors having a demonstrable effect upon interstate

58. "Fifthly and finally, it is urged that wages may be subjected to federal control in order to put an end to so-called unfair competition among coal producers and among producing States resulting from wage-cutting as translated into price-cutting; because, it is said, the States are powerless to establish uniform or properly related wage scales and hence the Federal Government is empowered to do so." Argument in *Carter v. Carter Coal Co.*, 298 U. S. 238, at 246.

competition may be supported on conventional and orthodox constitutional grounds. They do not reflect any violent shift in constitutional doctrine.

Some reliance has been placed by the Government upon the opinion in *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533. This case may be sustained on any one or more of several tenable grounds. The regulation effected by the *Agricultural Marketing Agreement Act of 1937*⁵⁹ was the fixing of prices for the purchase of milk "in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce" in milk.⁶⁰ Since price regulation, *per se*, is not forbidden to the Federal Government, the only reasonable constitutional objection which could be urged in the *Rock Royal* case was that the regulation "of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant,"⁶¹ was outside the scope of the Federal power. The facts of that case sufficiently indicate that the regulated prices in interstate sales, which have always been subject to regulation by Congress, were so commingled with the intrastate sales as to justify a uniform and effective regulation of the entire price structure under the doctrine of *Curran v. Wallace*, 306 U. S. 1. We submit that the conditions controlled in the *Rock Royal* case, in their relationship

59. Act of June 3, 1937, 50 Stat. 246, re-enacting and amending certain provisions of Agricultural Adjustment Act, Act of May 12, 1933, 48 Stat. 31, as amended August 24, 1935, 49 Stat. 750.

60. §8c(1).

61. 307 U. S. 533, at 568.

to interstate commerce, are not comparable to those brought within the scope of the *Fair Labor Standards Act*.

The holding in *Mulford v. Smith*, 307 U. S. 38, does not support the thesis of the Government in the instant case. It was apparent in the *Mulford* case that the activities regulated directly burdened interstate commerce and obstructed the flow of certain commodities in interstate commerce. That decision did not sanction any regulation of interstate competition in the sense asserted here, since there was no indication that any practice which diverted commerce from one class of producers to another by reason of allegedly unfair competitive practices was there regulated.

The statute sustained in *Currin v. Wallace* controlled matters closely related to sales in interstate and foreign commerce. The cases principally relied upon by the Court as analogous and as authority for the validity of that statute involved instances of regulation at points in the stream of interstate commerce where complete control of the flow was centered, such as the *Stafford*,⁶² *Olsen*,⁶³ and *Lemke*⁶⁴ cases. The considerations controlling in those cases are not applicable to the factual situation now before the Court.

The *Kentucky Whip & Collar* case, 299 U. S. 334, clearly does not of its own force authorize Congress-

62. 258 U. S. 495.

63. 262 U. S. 1.

64. 258 U. S. 50.

sional regulation of interstate competition in the manner attempted under the *Fair Labor Standards Act*. The protection afforded by that decision related entirely to competition between a producing state and the consuming state. Stating the proposition in another way, the rule of the *Convict Labor* case protected the markets of the state of destination from the ruinous competition of states with lower labor standards and preserved such markets for locally produced commodities. In a correct sense, therefore, the concern of that case was directed to the effect of the competition of interstate commerce on intrastate commerce. It is clear that under the Articles of Confederation, no state had any inviolable right to market its products in another state in violation of the policy of such state of destination. We submit that the authority of that decision is restricted and its holding simply affirms that the power to protect the domestic markets of a consuming state against interstate competition, and to preserve the markets of such state for its own goods, was not lost by the division of power between state and nation under the Constitution.

The crux of the contention of the Government is thus stated in appellant's brief:

"Even if a state could protect itself against the introduction of goods produced under substandard conditions in other states, it could not thereby safeguard its industries against the loss of their markets in the forty-seven other states of

the Union. This national market is, of course, vital to the commerce and industry of each state, which have been developed on a nation-wide scale as a result of the prohibition which the commerce clause imposed upon the power of each state to exclude the products of other states from their local markets." Brief for the United States, at 42.

The fact that individual states can not adequately protect the markets which lie outside their borders for the orderly sale of their products does not vest in the National Government an unqualified power to regulate competition in these interstate markets. The pattern for regulatory control permitted by the Constitution does not comprehend a Federal power of such wide scope. The decisions of this Court conclusively show that activities within one state which have an effect upon conditions in other states may be regulated by Congress only when such activities can be said to affect directly commerce among the states.

(5) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not lead to labor disputes which burden and obstruct commerce and the free flow of goods in commerce so as to be subject to the regulatory power of Congress.

The argument of the Government proceeds somewhat along the following lines: The two most common causes of labor disputes which result in an obstruction of interstate commerce are sub-standard wages and hours and the refusal of employers to bargain collec-

tively with the freely chosen representatives of their employees. Legislation aimed at the latter evil has been upheld in the *Labor Board* cases. It follows that the former evil may be likewise regulated.

In reply to this suggestion, it has already been noticed that there is a fundamental distinction in the terminology of the *National Labor Relations Act* and the *Fair Labor Standards Act*.

The theory of the *Wagner Act* is that, since industrial strife in industries closely related to interstate commerce affects and stifles the flow of interstate commerce, Congress may regulate the labor relations between employers and employees in order to prevent the detrimental effect on interstate commerce. Stating it another way, if Congress has the power to control direct obstruction of interstate commerce, it also has the power to remove the causes that give rise to the obstruction.

This argument is inapplicable to the *Wage and Hour Law*. The power of Congress to remove the causes of obstruction must be exercised within constitutional limits. It may be exercised only where the effect upon interstate commerce is close and substantial. In regulating wages and hours of employees in the status of those of appellee, Congress has by legislative fiat cut far back into the area which is traditionally intrastate in character. In thus attempting to reach the alleged causes that bring about the obstruction, Congress has

imposed its will upon spheres of influence over which the states have sole supervisory control.

This has been done without giving the alleged offender any opportunity to show that his activities have no direct or substantial effect upon interstate commerce.

The *National Labor Relations Act* provides for an independent administrative inquiry which determines whether the forbidden labor practice in a particular industry has, in fact, a direct effect upon interstate commerce. The *Wage and Hour Law* makes no such provision. It attempts arbitrarily to blanket all industries under Federal control whenever any portion of the goods produced moves in interstate commerce or "is produced for commerce." It is the extreme in expanding Federal legislation, the acme, the *ultimitas* in the growth of Federal power, under the commerce clause. It is a bald, presumptive attempt on the part of Congress to prescribe standards of wages for all industry.

Comparison of the holdings in the various cases wherein this argument of the Government has been asserted discloses that the considerations applicable to an appraisal of the effects of labor relations in productive processes upon interstate commerce are the same as those applied in more conventional contexts.

A contrast between the *Schechter* case and the *Labor Board* cases is illustrative. It was urged by the Govern-

ment in the *Schechter* case that the wage and hour provisions of the *National Industrial Recovery Act* were part of a statutory plan for the prevention of restraints on commerce caused by labor disputes. The Court's clear analysis of the factors controlling in the demarcation of the dividing line between Federal and state powers shows the scrupulous regard of the Court for the diverse interests of the states and nation. The contention of the Government's counsel was accepted in the *Labor Board* cases where an indisputable showing was made that the duties of the affected employees bore a close and substantial connection with interstate commerce. A simple statement of the applicable principle was made by the Court in the *Jones & Laughlin* case in distinguishing the *Schechter* and *Carter* cases: "It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved." 301 U. S. 1, 40.

In no case which has been decided by this Court under the *National Labor Relations Act* has it been held that employees whose relationship to interstate commerce and to the internal concerns of the producing state, respectively, was comparable to that of the employees here involved, could be within the protective power of Congress under that Act. On the other hand, the *Schechter* and *Carter* cases have reached a contrary result, under other statutes, with specific refer-

ence to employees occupying the identical status of those now involved. The *Labor Board* cases have already been distinguished, so that further analysis seems unnecessary.

There is no power in the commerce clause, nor anywhere else in the entire Constitution, which permits such absolute centralized paternalism as is effected by the *Fair Labor Standards Act*. The pattern of the Act completely ignores the careful and painstaking distinctions drawn by this tribunal.

(6) The failure to conform to the statutory standard of minimum wages and maximum hours in manufacturing establishments similar to that of appellee does not interfere with the orderly and fair marketing of goods in commerce so as to be subject to the regulatory power of Congress.

The fifth finding of Congress is that the payment of sub-standard rates of wages works an interference with the orderly and fair marketing of goods in commerce. Apparently, the underlying theory here involved is that this finding may bring the Act within the principle of *Mulford v. Smith*, *Curran v. Wallace*, and the *Rock Royal* case. We submit the attempt is futile. In the first place, the *Fair Labor Standards Act* does not regulate interstate markets in any manner comparable to the legislation upheld in those cases. Here the regulation reaches directly the productive process, and there is no restriction in its scope to an indirect operation upon production, as was involved in

each of those decisions. It is admitted, as an abstract proposition, that Congress may control interstate marketing, even though production may be incidentally affected in the exercise of such control, but Congress may not justify a direct regulation of purely intrastate activities in production by merely showing, or asserting, an indirect or incidental relationship between the control and interstate marketing. The character of the relation of the practices regulated to interstate commerce, in the light of their connection also with matters of internal concern to the producing state, is the controlling element. That is to say, the manner in which interstate commerce is affected is determinative. The analysis to be applied is fully demonstrated in the cases already discussed.

There has been only one instance in the judicial history of this country in which the Supreme Court has sustained the regulation of wages and hours on the part of Congress as a constitutional exercise of its power under the commerce clause. That case is *Wilson v. New*, 243 U. S. 332, which upheld the *Adamson Act*. The prescription of rates of wages there extended only to common carriers in interstate commerce, instrumentalities of commerce admittedly subject to far-reaching Federal control. The facts and exigencies underlying the legislation were unique. Europe was at war. The transportation system of the nation was threatened by paralyzing strikes and labor disorders.

The carriers and their employees had refused to settle their differences by arbitration. Stoppage of transportation would have completely disrupted the commerce of the nation. The Court could not ignore the clear and intimate relationship between the matters regulated and the commerce of the nation, though cautiously stating that the exercise of the Congressional regulatory power was valid only by reason of the refusal of the parties to exercise their private power of settlement. The governmental power was expressly held to be secondary. The restraint of the Court is indicated by the following excerpt from the opinion:

“What was the extent of the power therefore of Congress to regulate considering the scope of regulation which government had the right to exert with reference to interstate commerce carriers when it came to exercise its legislative authority to regulate commerce? is the matter to be decided. That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is

primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority." *Wilson v. New*, 243 U. S. 332, 347.

The experience of the nation since the rendition of the decision in *Wilson v. New* has modified the force of the qualifications expressed by the Court in that opinion. The trend of constitutional doctrine makes it apparent that employees occupying the status of the railroad employees involved in the *Wilson* case are subject to the exercise of Congressional power irrespective of any considerations of immediate stalemate in private negotiations. It is not appellee's contention that the commerce clause prohibits Congressional regulation of wages and hours of production employees in every instance, but simply that the required intimacy between the duties of the employees of appellee and interstate commerce does not exist in this case.

In conclusion, an additional statement as to the individual and cumulative effect of §§15(a) (1) and 15(a) (2) may demonstrate the unprecedented scope of the regulation attempted by the *Fair Labor Standards Act*.

The former section, in making it unlawful to sell with knowledge that shipment or delivery or sale in interstate commerce is intended, denies to a producer who has produced commodities with a view to marketing them within the producing state the opportunity

to make a fortuitous sale to another who contemplates transporting, or selling, such commodities for transportation, across state lines, even though the producer, in not anticipating such sale or shipment in interstate commerce at the time of production, could not be held liable for the violation of §15(a) (2). In addition, criminal liability for sale or shipment in interstate commerce by the purchaser under these circumstances is imposed upon such purchaser. That the effect upon interstate commerce of the standard of wages and hours prevailing among the employees of a producer in this situation is remote, is manifest. The degree of remoteness is further increased in the application of the Act to the production of "any part or ingredient" of goods produced and sold in the manner stated.

Under the view of the Administrator of the Wage and Hour Division, §15(a) (2) may be applicable even though actual movement in interstate commerce of the goods produced does not occur. The Administrator has stated:

"Employees are engaged in the production of goods for commerce where the employer *intends* or *hopes* or *has reason to believe* that the goods or any unsegregated part of them will move in interstate commerce. * * * The facts at the time that the goods are being produced determine whether an employee is engaged in the production of goods for commerce and not any subsequent act of his employer or of some third party. Of course, the fact that the goods do move in interstate com-

merce is strong evidence that the employer intended, hoped, or had reason to believe that the goods would move in interstate commerce." [italics supplied] *Wage and Hour Interpretative Bulletin No. 5*, December 2, 1938.

Nothing can be plainer from the words of the Act, bolstered and supported by the interpretation of the Administrator, that §15(a) (2) thus constitutes solely a direct and barefaced regulation of conditions of employment, without authority under the Constitution. It has always been held that the power of the Federal Government can only be exerted because of movement at some time in interstate commerce. Under the *Wage and Hour Law*, this is no longer the test. The methods and conditions of production provide the test under this law. The method of acquiring the purported power has been forgotten in the zeal of its exercise.

Though in many instances a producer may be subject to both of these provisions of the *Wage and Hour Law*, it is seen that in numerous other instances a producer may be coerced by only one or the other of such provisions. Markets in other states are closed to him when he fails at the commencement of production to anticipate the demand in those markets. On the other hand, he may be subject to penalties provided for violation of §15(a) (2) even though the goods produced by him never in fact enter interstate commerce. In any event, the coercive effect of §§15(a) (1) and 15(a) (2) is identical in that they effectively require

all producers, by reason of the possibility that their products may find a market in other states or that their products may eventually move in interstate commerce even as an ingredient of other articles, to conform with the standard prescribed by the *Fair Labor Standards Act* in order to insure the marketability of their goods. Thus operating upon matters which only remotely concern interstate commerce, both of these sections are directed to the attainment of an unconstitutional objective and should be held invalid.

II.

The Fair Labor Standards Act of 1938 is an unconstitutional attempt to deprive appellee of his liberty and property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(a) Introduction.

Appellee asserted in the District Court that the *Wage and Hour Law* is violative of the Fifth Amendment in depriving him of liberty and property without due process of law. The Court found it unnecessary to express an opinion as to the validity of that objection since he found that the Act contravened the commerce clause in its application to defendant. Since the submission of that objection to this Honorable Court will operate to support the judgment of the District Judge, the question of the constitutionality of the Act in the light of the requirements of the Fifth Amendment is properly presented in this appeal. Appellant takes the same view and cites the controlling authori-

ties at pages 99-100 of its brief. Appellee unqualifiedly concurs in the statement of appellant as to the propriety of the consideration of the due process questions by this Court on the appeal in this case.

An impetus has been given to the growth of minimum wage legislation by the decision of this Court in *West Coast Hotel Company v. Parrish*, 300 U. S. 379. A statute of the State of Washington was there involved. Under its terms the employment of women and minors at less than the wage established by an administrative body was prohibited. A suit was brought by a chambermaid in a hotel to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The Supreme Court of Washington upheld the statute⁶⁵ and on appeal its decision was affirmed by this Court.

This tribunal regarded the rule of *Adkins v. Children's Hospital*, 261 U. S. 525, as outmoded and untenable, and expressly overruled that case. The distinction which had been established in prior decisions,⁶⁶ and which was observed in the *Adkins* case, between legislation affecting minimum wages and that dealing with maximum hours, was repudiated. The Government contends that the principle sustained in the *Parrish* case is broad enough to embrace the *Wage and Hour Act*. Appellee believes that the *Parrish* case is distinguishable and maintains that the *Fair Labor*

65. *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P. (2d) 1083.

66. Cf. *Bunting v. Oregon*, 243 U. S. 426.

Standards Act is violative of the due process clause of the Fifth Amendment of the Federal Constitution.

(b) The Wage and Hour Act is a deprivation of the freedom of contract guaranteed to appellee by the Fifth Amendment and is, therefore, violative of the due process clause.

It is firmly established that the due process clause of the Fifth Amendment is a limitation upon all of the powers conferred by the people upon the Federal Government, including the power granted by the commerce clause. See *Curran v. Wallace*, 306 U. S. 1, 14, and cases cited therein.

In asserting that the *Wage and Hour Law* is violative of the liberty guaranteed by the Fifth Amendment, appellee does not contend that the privilege of the individual to contract is an absolute and unqualified right. Manifestly, there are many restrictions which must be imposed to safeguard the interests of the community. These exceptions have been carefully noted by this Court in the decisions,⁶⁷ but there remains a prohibition against any arbitrary deprivation of the usual and customary freedom to contract. That freedom remains one of the most valued rights of a nation of free men.

67. Illustrative of the restrictive power are the cases of *Holden v. Hardy*, 169 U. S. 366—limiting working hours in mines; *Knoxville Iron Co. v. Harbison*, 183 U. S. 18—making mandatory redemption of store orders in cash; *Patterson v. Bark Eudora*, 190 U. S. 169—prohibiting payment of seamen's wages in advance; *Bunting v. Oregon*, *supra*—limiting hours of work in manufacturing establishments.

It is imperative to recognize the distinction between the type of legislation upheld in the *Parrish* case and that involved in the case at bar. The Washington statute involved a minimum wage for women and minors. Adult men did not come within its scope. Contrastingly, the *Fair Labor Standards Act* is a bold and unparalleled piece of legislation of the most sweeping and drastic character. The regimentation effected has been all pervasive and all inclusive, and liberty of contract has been utterly ignored.

It is significant that no statute has yet received judicial sanction by this Court which involved the establishment of minimum wages for men with the exception of *Wilson v. New*, *supra*. Chief Justice Hughes expressly recognized in his decision in the *Parrish* case the peculiar relationship of women to industry. He pointed out:

"What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the

ready victims of those who would take advantage of their necessitous circumstances." 300 U. S. 379, at page 398.

This same distinction is brought to the fore in the opinion of the Court in *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 629:

"When there are conditions which specially touch the health and well-being of women, the State may exert its power in a reasonable manner for their protection, whether or not a similar regulation is, *or could be*, applied to men. The distinctive nature and function of women—their particular relation to the social welfare—has put them in a separate class. This separation and corresponding distinctions in legislation is one of the outstanding traditions of legal history." [italics supplied]

Care has been taken by the legislatures to recognize the inherent distinction between the bargaining power of men and women. Moreover, the veto power of the Executive has been used to prevent the enactment of blanket legislation, and it is safe to assume that the veto came about because of a feeling that constitutional power was lacking.⁶⁸ There is no such feeling of

68. "The New York legislature passed two minimum wage measures and contemporaneously submitted them to the Governor. One was approved; it is the Act now before us. The other was vetoed and did not become law. They contained the same definitions of oppressive wage and fair wage and in general provided the same machinery and procedure culminating in fixing minimum wages by directory orders. The one vetoed was for an emergency; it extended to men as well as to women employees; it did not provide for the enforcement of wages by mandatory orders." Mr. Justice Butler in *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, at page 615.

restraint in the *Wage and Hour Act*. With minor exceptions, it is aimed at all industry and at all employees. The categories of permissible subjects of regulation have been ignored. It is impossible to imagine a statute with less regard for precedent or tradition. Its consideration provides a timely and opportune point at which the encroachment of the Federal Government should be stayed. The deductions which have been drawn from the *Parrish* case should be halted, and the permissible scope of regulation should be carefully analyzed. The implications of that decision must be confined within safe boundaries. Sound government demands that the doctrine there enunciated should not be broadened to a limitless area. Appellee believes that the freedom of contract guaranteed to him by the Constitution comprehends, between his employees and himself, the inherent and unqualified right to bargain as to wages and hours.

(c) The *Wage and Hour Act* is violative of the due process clause because it is arbitrary and capricious.

It is of vital importance to notice that the Washington law sustained in the *Parrish* case was flexible and elastic in its operation. Adequate administrative machinery was established for its adaptation to varying conditions in each and every industry. The legislature was realistic, and it recognized the necessity for the establishment of different standards which should vary as the needs and ability of the various industries to pay was demonstrated. An administrative body, the

Industrial Welfare Committee, was required first to ascertain the wages and conditions of labor of women and minors throughout the state. Public hearings were to be held. The Committee was then given power to call a conference of representatives of employers and employees, together with disinterested parties representing the public, if it should find that a certain trade or industry was paying wages which were inadequate to supply the workers with wages that would enable them to live. The conference was then to recommend to the Committee an estimate of an adequate minimum wage. When the recommendation was approved, the Committee was empowered to establish an obligatory order which would fix the minimum wages. Any such order that was passed was subject to revision with the aid of a new conference. Every detail of the legislation, and every step before the enactment of an obligatory order, shows clearly the care and caution inherent in the Act.

The *Wage and Hour Law* is in direct contrast to the reasonable and flexible provisions of the Washington Act. It has imposed a rigid and inflexible standard for all industry. It has necessarily ignored the requirement implicit in every statutory regulation of prices that the amount to be paid, and the article or service to be procured, shall bear to each other some relation of just equivalence. Adherence to this fundamental precept was implicit in the pattern and mode of oper-

ation of the Washington statute. A reference of the Court to this feature of the law is instructive:

"The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service." 300 U. S. 379, at page 396.

The *Fair Labor Standards Act* can not be given the benefit of such an assumption. It is self-evident that the blanket, rigid and inflexible standard established by this legislation can have no relation of equivalence to the value of individual services performed in all enterprises. This is undeniable because, prior to its enactment, there was no investigation of its effect on individual enterprises. This inherent weakness in the original bill was discussed in the conferences of the House Committee on Labor. A sharp conflict of views as to its validity was developed. A minority report written by Honorable Robert Ramspeck, ranking Democratic member of the Committee, is most enlightening in its discussion of the constitutional necessity for flexibility. The very authors of the Act were dubious of its effect throughout the nation. Their fears, in the light of experience, were not unjustified.⁶⁹

69. Because of its importance and clarity we are including in its entirety the statement of the separate views of Mr. Ramspeck on this feature of the bill. The minority report reads as follows:

The Court unquestionably will take judicial notice of local and occupational problems that are inherent in each and every individual industry. The range in the rates of wages which were being paid prior to the effective date of the *Wage and Hour Law* is an obvious recognition of this inconsistency in the economic life of this country. It is not reasonable to assume that all employers who pay high wages are for that reason generous and far-sighted, while those who pay lower wages are unfeeling oppressors of labor. Instances of

"In the opinion of the undersigned, the bill being reported by the majority of the Committee on Labor of the House as a substitute for the bill passed by the Senate is not a reasonable exertion of governmental authority, but, on the contrary, is arbitrary and discriminatory. It is our opinion that it violates the due-process clause of the Constitution, and therefore will be held invalid when it reaches the Supreme Court if it should be enacted into law.

"The history of minimum-wage legislation is as follows: In 1923 the Supreme Court held invalid in the *Adkins case* the District of Columbia statute providing for regulation of minimum wages through wage boards. Later the State of Arizona passed a minimum wage law in a different form. Instead of creating a board to set wages the statute fixed a uniform minimum of \$16 per week. In a memorandum opinion this statute was held invalid, and likewise a statute from Arkansas similarly drafted was held invalid a year later. The Arizona case is reported in 269 U. S. 430, and the Arkansas in 273 U. S. 657.

"Last year in the case of *Parrish v. West Coast Hotel Company*, (300 U. S. 375), the Supreme Court, by a 5 to 4 decision, reversed its previous holding in the *Adkins case* and specifically overruled that case. It is significant to note that the Court failed to specifically overrule its previous decisions in the Arizona and Arkansas cases.

"There is only one other Supreme Court decision in the history of this type of legislation. It is the case of *Morehead v. New York* (298 U. S. 587). In that decision the Supreme Court held invalid a minimum-wage law for women in the State of New York. Chief Justice Hughes wrote a dissenting opinion which was concurred in by Justices Brandeis, Stone, and Cardozo. This opinion upheld the statute because the minimum wages were to be based upon two standards, one of which was the reasonable value of services performed.

"It seems that this minority opinion in the *New York case* is now of the utmost importance since the reasoning contained therein was in part used to sustain the Washington State statute in the *Parrish case*.

"It must be remembered that the Supreme Court has never yet conceded plenary power to Congress or to State legislatures to fix

employers who exist by the sweat of the labor of their employees are happily isolated. The true reason for the discrepancy in wages is either that particular industries are incapable of bearing wages comparable to the higher level in the more prosperous units of the industrial sphere or that the quality of the labor does not warrant the higher wage scale. Due process requires that recognition be given to the relative economic ability of employers to pay particular rates of wages, and the validity of legislation which fixes wages

prices or wages. The exercise of such power has been upheld in only two cases, one of which—the *Parrish case*—has already been discussed.

"In the other case, which is *Nebbia v. New York* (291 U. S. 502), the Supreme Court upheld the statute permitting price-fixing with regard to milk, but in this case and in the *Parrish case*, the power to fix prices and wages was delegated to fact-finding agencies, and these agencies were directed to establish varying prices and wages in accordance with standards incorporated in the laws. The Court pointed out that such statutes must be reasonable and not arbitrary or capricious, and that the right to infringe upon liberty of contract must be justified by considerations of health, the preservation of life, and the protection of a business essential to the public.

"It may be contended that the bill reported by the majority of the committee provides for uniform wage and for uniform hours and is therefore not discriminatory, but when these figures are translated into actual wages in the terms of what the dollars will buy, it will be found that the proposal does not provide uniformity in that respect.

"In the *Washington State case*, Chief Justice Hughes based his decision largely upon the theory that a workman should at least receive the bare cost of living, and pointed out that if this was not the case, the taxpayers were called upon to pay the difference.

"The foregoing is a discussion of the legal questions growing out of the due-process aspect, but we must also keep in mind the fact that before the Federal Government can regulate wages and hours the interstate-commerce clause comes into play.

"The bill reported by the majority provides for no fact-finding procedure and totally ignores the fact that in a country as large as the United States there are thousands of varying conditions to which this inflexible proposal must be applied.

"For instance, the Bureau of Labor Statistics reports that in towns and villages of a population of 5,500 and less, an average monthly rental of \$11 is paid by those in the income group of less than

is dependent upon a recognition of this factor. Due process likewise demands the establishment of proper classifications and a different treatment to the various classifications, where uniformity of status is completely lacking. Due process is not satisfied with a mere imposition of a rigid and unyielding standard that does not heed the possible results in industries that are incapable of compliance.

\$1,000. This monthly rental shows a gradual increase as the size of the community increases, and averages \$23 per month in cities having a population of more than 1,000,000. It will be seen therefore that although this proposal would prescribe the same minimum wage in the city of less than 5,500 population as it does for the city of more than a million, the worker in the latter city would necessarily pay more than twice as much rent per month as the worker in the small community, and therefore his real wages would be less.

"Another illustration of the complexities to be faced by an inflexible statute can be had from a comparison of rents in Columbia, S. C., and Gastonia, N. C. In Columbia, the worker making from \$500 to \$1,000 per year will pay \$12.60 per month rent, while in Gastonia a worker with the same income will pay only \$7.40 per month. The worker in Gastonia will therefore get in actual wages an advantage of \$5.20 per month over his brother worker in Columbia.

"We must also consider, from the standpoint of the employer upon whom this burden is to be imposed, the cost of transportation. He must secure raw materials and his finished product must go to the market.

"Fifty-one percent of the population of our country lives in what is known as eastern or official territory with regard to freight rates. Using this territory as the base for 100 the following are the average freight rates for the other sections of the country: Southern, 139; western trunk line, 147; mountain Pacific, 171; and south-western, 175.

"To impose a rigid inflexible wage in all parts of the United States will unquestionably mean that some employers cannot longer compete in the eastern market where a majority of our consumers reside. That means, therefore, retirement from business, and their employees instead of having their wages raised, will find themselves on relief.

"It seems to the undersigned, therefore, that to approach a solution of this problem, we must have a fact-finding process to which Congress must delegate the power to determine what wages and what hours shall be applied after a thorough consideration of the facts. To do otherwise, would be arbitrary and capricious, would be discriminatory, and would violate the due-process requirements of our Constitution." *House Report No. 2182, 75th Cong., 3d Sess., pp. 20, et seq.*

(d) The Wage and Hour Act is violative of the due process clause by reason of its indefiniteness in defining the persons subject to its penal provisions.

It is one of the most fundamental precepts of criminal law that a penal statute should be definite and certain. It should define its orbit with exactitude so that a citizen may be aware of the penalties attendant upon a certain course of conduct. This is as it should be. Liberty is a precious attribute of civilization, and a criminal statute is the most extreme example of restraint that a government knows. Arrest, indictment, fine and imprisonment are harsh deterrents, so that prohibited acts should be defined with such care that only the foolhardy or vicious will be penalized. The standard has been thus defined:

"The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid." 14 Am. Jur. 773, §19.

The *Wage and Hour Act* defines with certainty the prescribed standard of conduct, but it differs radically from the usual criminal statute in that it completely fails to indicate the persons who are subject to its terms. The effect of such a plan is to declare unlawful a class of acts which it defines, in essence, not by their intrinsic nature, but by their indirect, contingent and unascertainable results. Within the framework of the

statute the naval stores operator may work side by side with the sawmill operator and may with impunity work a thousand hands at a wage that suits his convenience.⁷⁰ But the defendant, Darby, must gamble upon his chances of mastering the meaning of the rather rarefied concepts of "stream of interstate commerce" and "production for interstate commerce." This Court has had occasion to discuss the seriousness of this character of indefiniteness found in a state statute. See *Smith v. Cahoon*, 283 U. S. 553, 562-566. A Florida act attempted regulation beyond the scope of the powers of the legislature, and the act was held invalid because it failed to define the precise limits of the class over which it could exercise control constitutionally. The Court held: "The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord." 283 U. S. 553, at 564.

Congress itself was not unmindful of this defect in the *Fair Labor Standards Act*. Section 6 of the original bill which passed the House of Representatives provided for due notice and hearings to determine the relation of various industries to commerce. The Secretary of Labor was then empowered to establish the statutory wages in industries where there was a find-

70. §13(a) (6). See also §3(f).

ing. (a) *that the activities of such industries were nation-wide in their scope, or (b) that such industries were dependent for their existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce, or (c) that the relation of such industries to commerce was in other respects close and substantial.*

The reasons for this statutory scheme are clearly given in the report of the Committee on Labor:

"Section 6 of the committee amendment directs the Secretary, as soon as practicable after the enactment of the act, to determine the relation of the various industries to commerce. The Secretary is to give due notice to interested persons and an opportunity to be heard. If in the case of any industry the Secretary finds that the activities of the industry are nation-wide in their scope, or that the industry is dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce, or that the relation of the industry to commerce is in other respects close and substantial, the Secretary is required to issue an order declaring the industry to be an industry affecting commerce.

* * * * *

"Whether the activities of a particular industry are such as to bring that industry within the regulatory power of Congress depends upon facts and is necessarily a question of degree in each case. Hence, it is necessary to have someone determine those facts. Two courses were open to the committee. The committee could have provided

that the facts in each particular case be determined by the trial court in a criminal prosecution for violation of the act, or it could have confided the determination of these facts in the first instance to an administrative officer and provided for court review of the order declaring the facts found to exist. *Had the first course been adopted, the bill would necessarily have been so indefinite that no employer would know whether or not he was subject to the act, and then, too, each criminal prosecution for violation of the act would have been prolonged indefinitely, inasmuch as the great bulk of the testimony would be directed to the relation of the industry, in which the employer concerned was engaged, to interstate commerce. Hence, the second course was adopted. Inasmuch as there are provisions for court review of the order of the Secretary finding a particular industry to be one affecting commerce, the validity of such an order may be questioned only in such review proceedings, and may not be questioned collaterally in a criminal proceeding involving a violation of the act, although, of course, the effect, under the Constitution, of the order and of the Secretary's finding can always be questioned in any proceeding.*

"Once the Secretary issues an order under section 6 with respect to a particular industry, the Secretary has discharged his functions under the act, and thereafter the wage-and-hour provisions operate automatically on all employers in the industry who are engaged in commerce." [italics supplied] *House Report No. 2182, 75th Cong., 3d Sess., pp. 9, 11.*

But the House bill was not adopted. Its pace was too slow. Utopia must be made by the dead line. It is impossible to make any deduction other than that the very uncertainty of the legislation has been of inestimable value in coercing individuals to obey its mandate when, in reality, it could not constitutionally be drafted to include them.

The expressions used in the original House bill to indicate the persons subject to the statute were no less definite than the corresponding provisions of the conference bill which was enacted into law. The definitions in §3 do not sufficiently clarify the scope of the Act.

It is idle to draw an analogy between the *Fair Labor Standards Act* and the *National Labor Relations Act*. In the latter Act, the problem is obviated by administrative machinery to determine the relationship of particular enterprises to interstate commerce. It is in line with the plan contemplated in the original House bill. But under the *Wage and Hour Law* an individual is acquainted with his relationship to interstate commerce by the indictment at the hands of a grand jury. So it has been, in the instant case, with the defendant, Darby.

III.

Conclusion.

Careful analysis of all the authorities compels the conclusion that no decision has yet been rendered by this Court which, either of its own force, or by analogy,

is sufficient to sustain the *Fair Labor Standards Act of 1938*. The Act reaches far beyond any regulation by Congress that has received judicial sanction. The tradition and value of our constitutional form of government require that it be held invalid.

The doctrine of *Hammer v. Dagenhart*, as exemplified in subsequent decisions down to the immediate present, is a proper and efficient safeguard to the permanence of our constitutional structure. It is, and has been, admitted that emotionalism has undermined some of the *dicta* in that decision but its basic principle has not been, and can not be, questioned—that principle is that the Federal Government may not, under color of the commerce clause, subject the states to complete domination in matters of internal policy. It is possible both to abhor child labor and to approve *Hammer v. Dagenhart*, with no sacrifice of consistency.

This Court has ever been careful to restrict Federal control to matters which bear a close, substantial relationship to interstate commerce. Without exception any control over intrastate activities has been permitted only when the effect was incidental and secondary. To preserve this line of demarcation—which is a real and vital one—is of paramount importance to the preservation of our dual form of government. In attempting to obliterate the distinction between local and national spheres of power, the *Fair Labor Standards Act* breaks through and smashes the

proper confines of Federal power which the Court has so carefully and painstakingly blazed.

The ideal example of the State and National Governments working in unison towards the same definite social goal is found in *Kentucky Whip & Collar Co. v. I. C. R. Co.* The police power of the competing states was there preserved in its full vitality. There is no example of a restless grasp for non-existent power. It shows the Federal Government as supplementing and encouraging the social legislation of a state. Far from constituting authority for the extension of Federal power, it preserves it within its proper sphere. The result will be to preserve the states as invaluable laboratories for their wise—as well as for their misguided—attempts to better the social life of their citizens. The *Wage and Hour Law* would have been comparable if it had forbade the transportation in interstate commerce of goods where the state of origin had produced at lower labor costs than prevailed in the state of destination. But this has not been done. The Act has placed the industry of the nation under a rigid, inflexible, single standard. Once recognition of the power claimed is granted, the floodgates are opened. Subsequent legislation may entail more inequalities and discriminations than are inherent in a minimum wage statute. An utterance of this body is prophetic:

“Every journey to a forbidden end begins with the first step; and the danger of such a step by

the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.” *Carter v. Carter Coal Co.*, 298 U. S. 238, 295.

If Congress had the power under the commerce clause to enact this legislation, if that were conceded for the purpose of considering the other constitutional objections to the Act, nevertheless, the mode of exercising the power violates the Fifth Amendment. The statute is so indefinite that it fails absolutely to inform appellee as to whether or not his business activities are within its scope. Indefiniteness in this respect is just as fatal as in the ordinary criminal statute. Cf. *United States v. Cohen Grocery Company*, 255 U. S. 81.

Furthermore, in establishing a standard of conduct the *Wage and Hour Law* is arbitrary and capricious. It imposes by legislative fiat one rigid, inflexible standard upon all industries without regard to local and occupational problems. The only permissible pattern of wage legislation is demonstrated in *West Coast*

Hotel Co. v. Parrish. Due process requires reasonable classification to meet individual problems. Due process also requires adequate investigation before imposition of the will of the legislature.

Accordingly, appellee submits that the *Fair Labor Standards Act* is unconstitutional for the reasons outlined in this brief, and that the Court should affirm the judgment of the District Court.

Respectfully submitted,

ARCHIBALD B. LOVETT,
R. BASIL MORRIS,
ROBERT M. HITCH, JR.,
MALBERRY SMITH, JR.,

Attorneys for Appellee.

17 Drayton Street,
Savannah, Georgia.

SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

No. 82.—OCTOBER TERM, 1940.

The United States of America, Appellant,
vs.
~~F. W. Darby Lumber Company and~~
Fred W. Darby.

Appeal from the District Court of the United States for the Southern District of Georgia.

[February 3, 1941.]

Mr. Justice STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum; and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to wit, lumber, for interstate commerce."

Appellees demurred to an indictment found in the district court for southern Georgia charging them with violation of § 15(a) (1) (2) and (5) of the Fair Labor Standards Act of 1938; 52 Stat. 1060, 29 U. S. C. § 201, *et seq.* The district court sustained the demurrer and quashed the indictment and the case comes here on direct appeal under § 238 of the Judicial Code as amended, 28 U. S. C. § 345, and § 682, Title 18 U. S. C., 34 Stat. 1246, which authorizes an appeal to this Court when the judgment sustaining the demurrer "is based upon the validity or construction of the statute upon which the indictment is founded."

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under

labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2(a) of the Act,¹ and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him.

Section 15 of the statute prohibits certain specified acts and § 16(a) punishes willful violation of it by a fine of not more than \$10,000 and punishes each conviction after the first by imprisonment of not more than six months or by the specified fine or both. Section 15(1) makes unlawful the shipment in interstate commerce of any goods "in the production of which any employee was employed in violation of section 6 or section 7", which provide, among other things, that during the first year of operation of the Act a minimum wage of 25 cents per hour shall be paid to employees "engaged in [interstate] commerce or the production of goods for [interstate] commerce," § 6, and that the maximum hours

¹ Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

Section 3(b) defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

of employment for employees "engaged in commerce or the production of goods for commerce" without increased compensation for overtime, shall be forty-four hours a week. § 7.

Section 15(a)(2) makes it unlawful to violate the provisions of §§ 6 and 7 including the minimum wage and maximum hour requirements just mentioned for employees engaged in production of goods for commerce. Section 15(a)(5) makes it unlawful for an employer subject to the Act to violate § 11(c) which requires him to keep such records of the persons employed by him and of their wages and hours of employment as the administrator shall prescribe by regulation or order.

The indictment charges that appellee ~~is~~ engaged, in the state of Georgia, in the business of acquiring raw materials, which ~~they~~ manufacture into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that ~~they~~ do in fact so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee ~~have~~ employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellee of workmen in the production of lumber for interstate commerce at wages of less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellee with failure to keep records showing the hours worked each day a week by each of ~~their~~ employees as required by § 11(c) and the regulation of the administrator, Title 29, Ch. 5, Code of Federal Regulations, Part 516, and also that appellee unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce".

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged

in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment are thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

The case comes here on assignments by the Government that the district court erred insofar as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and appellees seek to sustain the decision below on the grounds that the prohibition by Congress of those Acts is unauthorized by the commerce clause and is prohibited by the Fifth Amendment. The appeals statute limits our jurisdiction on this appeal to a review of the determination of the district court so far only as it is based on the validity or construction of the statute. *United States v. Borden Co.*, 308 U. S. 188, 193-195, and cases cited. Hence we accept the district court's interpretation of the indictment and confine our decision to the validity and construction of the statute.

The prohibition of shipment of the proscribed goods in interstate commerce. Section 15(a) (1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and

the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed". *Gibbons v. Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. *Reid v. Colorado*, 187 U. S. 137; *Lottery Case*, 188 U. S. 321; *United States v. Delaware & Hudson Co.*, 213 U. S. 366; *Hoke v. United States*, 227 U. S. 308; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311; *United States v. Hill*, 248 U. S. 420; *McCormick & Co. v. Brown*, 286 U. S. 131. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, *Lottery Case*, *supra*; *Hipolite Egg Co. v. United States*, 220 U. S. 45; cf. *Hoke v. United States*, *supra*; stolen articles, *Brooks v. United States*, 267 U. S. 432; kidnapped persons, *Gooch v. United States*, 297 U. S. 124, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.*, *supra*, but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution." *Gibbons v. Ogden*, *supra*, 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.*, *supra*. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the

states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. *Reid v. Colorado, supra; Lottery Case, supra; Hipolite Egg Co. v. United States, supra; Hoke v. United States, supra.*

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. *Seven Cases v. United States*, 239 U. S. 510, 514; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156; *United States v. Carolene Products Co.*, 304 U. S. 144, 147; *United States v. Appalachian Electric Power Co.*, No. 12, decided December 16, 1940.

The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States*, 195 U. S. 27; *Sonzinsky v. United States*, 300 U. S. 506, 513 and cases cited. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power". *Veazie Bank v. Fenno*, 8 Wall. 533. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for

repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*, 247 U. S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. *Brooks v. United States*, *supra*; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, *supra*; *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419; *Mulford v. Smith*, 307 U. S. 38. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. *Reid v. Colorado*, *supra*; *Lottery Case*, *supra*; *Hipolite Egg Co. v. United States*, *supra*; *Seven Cases v. United States*, *supra*, 514; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, *supra*, 156; *United States v. Carolene Products Co.*, *supra*, 147. And finally we have declared "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce". *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 569.

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. Section 15(a)(2) and §§ 6 and 7 require employers to conform to the wage and hour

provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellees' employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15(a)(2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce", it embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. Cf. *United States v. New York Central R. R. Co.*, 272 U. S. 457, 464.

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, S. Rept. No. 384 75th Cong. 1st Sess., pp. 7 and 8; H. Rept. No. 2738, 75th Cong.

3d Sess., p. 17, that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.²

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*, 4 Wheat. 316, 421. Cf. *United States v. Ferger*, 250 U. S. 199.

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. *Minnesota Rate Cases*, 230 U. S. 352, 398 *et seq.*, and cases cited; 410 *et seq.*, and cases cited. In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. *Kidd v. Pearson*, 128 U. S. 1; *Bacon v. Illinois*, 227 U. S. 504; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Co. v. Lord*, 262 U. S. 172.

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466. A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations*

² Cf. Administrator's Opinion, Interpretative Bulletin No. 5, 1940 Wage and Hour Manual, p. 131 *et seq.*

Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 38, 40; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604, and cases cited. But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.³

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act or whether they come within the statutory definition of the prohibited Act as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce as it did in the present act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States v. Ferger, supra*; *Virginian R. Co. v. Federation*, 300 U. S. 515, 553.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the per-

³ It may prohibit wholly intrastate activities which, if permitted, would result in restraint of interstate commerce. *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310; *Local 187 v. United States*, 291 U. S. 293, 297. It may regulate the activities of a local grain exchange shown to have an injurious effect on interstate commerce. *Chicago Board of Trade v. Olsen*, 262 U. S. 1. It may regulate intrastate rates of interstate carriers where the effect of the rates is to burden interstate commerce. *Hodgson, E. & W. Texas Ry. Co. v. United States*, 234 U. S. 342; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co.*, 257 U. S. 563; *United States v. Louisiana*, 290 U. S. 79, 74; *Florida v. United States*, 295 U. S. 1. It may compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad. *Southern Ry. Co. v. United States*, 222 U. S. 20. It may prescribe maximum hours for employees engaged in intrastate activity connected with the movement of any train, such as train dispatchers and telegraphers. *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619.

mitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. See *Ruppert v. Caffey*, 251 U. S. 264; *Everard's Breweries v. Day*, 265 U. S. 545, 560; *Westfall v. United States*, 274 U. S. 256, 259. As to state power under the Fourteenth Amendment, compare *Otis v. Parker*, 187 U. S. 606, 609; *St. John v. New York*, 201 U. S. 633; *Purity Extract and Tonic Company v. Lynch*, 226 U. S. 192, 201-202. A familiar-like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*, 234 U. S. 342; *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; *United States v. New York Central R. R. Co.*, *supra*, 464; *Curriu v. Wallace*, 306 U. S. 1; *Mulford v. Smith*, *supra*. Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton v. United States*, 271 U. S. 414. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce. *McDermott v. Wisconsin*, 228 U. S. 115. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Curriu v. Wallace*, *supra*, 11, and see to the like effect *United States v. Rock Royal Co-op.*, *supra*, 568, note 37.

We think also that § 15(a)(2), now under consideration, is sustainable independently of § 15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent disloca-

tion of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair", as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. See *Van Camp & Sons v. American Can Co.*, 278 U. S. 245; *Federal Trade Comm'n v. Keppel & Bro.*, 291 U. S. 304.

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. See as to the Sherman Act, *Northern Securities Company v. United States*, 193 U. S. 197; *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *Local No. 167 v. United States*, 291 U. S. 293; *Stevens Co., et al. v. Foster & Kleiser Co., et al.*, No. 41, decided December 9, 1940. As to the National Labor Relations Act, see *National Labor Relations Board v. Fainblatt*, *supra*, and cases cited.

The means adopted by § 15(a) (2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. See *Currin v. Wallace*, *supra*, 11. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. *National Labor Relations Board v. Fainblatt*, *supra*, 606.

So far as *Carter v. Carter Coal Co.*, 298 U. S. 238, is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. See also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *Currin v. Wal-*

lace, *supra*; *Mulford v. Smith*, *supra*; *United States v. Rock Royal Co-op.*, *supra*; *Clover Fork Coal Co. v. National Labor Relations Board*, 97 F. (2d) 331; *National Labor Relations Board v. Crowe Coal Co.*, 104 F. (2d) 633; *National Labor Relations Board v. Good Coal Co.*, 110 F. (2d) 501.

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people". The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e. g., II Elliot's Debates, 123; 131; III *id.* 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, secs. 1907-1908.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324, 325; *McCulloch v. Maryland*, *supra*, 405, 406; *Gordon v. United States*, 117 U. S. 697, 705; *Lottery Case*, *supra*; *Northern Securities Co. v. United States*, *supra*, 344-345; *Everard's Breweries v. Day*, *supra*, 558; *United States v. Sprague*, 282 U. S. 716, 733; see *United States v. The Brigantine William*, 28 Fed. Cas. No. 16,700, p. 622. Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. See also, *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330-331; *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 516.

Validity of the requirement of records of wages and hours. § 15(a)(5) and § 11(c). These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress

one-half times the regular rate' at which the worker is employed.

may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. See *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 42.

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime. Since our decision in *West Hotel Co. v. Parrish*, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. *Holden v. Hardy*, 169 U. S. 366; *Muller v. Oregon*, 208 U. S. 412; *Bunting v. Oregon*, *supra*; *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, *supra*. Similarly the statute is not objectionable because applied alike to both men and women. Cf. *Bunting v. Oregon*, 243 U. S. 426.

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. *Nash v. United States*, 229 U. S. 373, 377.

We have considered, but find it unnecessary to discuss other contentions.

Reversed.

END